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LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM

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Lt Col Richard J. Erickson

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LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM

by

RICHARD J. ERICKSON, LT COL, USAF
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Winner of the Air Force Historical Foundation's 1987 Colonel James Cannell Memorial Award

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FOREWORD

A military response has been a viable option for combating international terrorism in the past and it will continue to be an option in the future. Possible military actions range from rescuing hostages to neutralizing terrorist camps and making direct strikes against targets verified as the infrastructure for state-sponsored training and support complexes of terrorist groups.

The military response is part of a larger strategy that seeks to maximize the risk of punishment for terrorists and their sponsors and supporters while minimizing their potential rewards. In this context military action must be consistent with international law. If states decide that all means are justified, then those acting to preserve the rule of law in the face of the terrorist threat will become indistinguishable from the evil they seek to undo.

Colonel Erickson's study presents an overview of international law directed at the issue of managing international terrorism. This study is thought provoking and provides the decisionmaker with a useful tool. Of particular note is the checklist provided in appendix A that summarizes chapters 4–6.

It behooves everyone dedicated to achieving a world free from terror to learn more of this phenomenon and how we can deal with it. Colonel Erickson's study, for the first time and in one place, makes available a general survey of international law concerning this subject. I highly recommend his study.

Robert W. Norris

ROBERT W. NORRIS
Major General, USAF
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ABOUT THE AUTHOR

Lt Col Richard J. Erickson

Lt Col Richard J. Erickson was The Judge Advocate General, Headquarters United States Air Force, sponsored research fellow to the Airpower Research Institute (ARI), Air University Center for Aerospace Doctrine, Research, and Education (AUCADRE) for 1986–87.

Colonel Erickson graduated from Florida State University with a bachelor of arts (honors) in international relations and speech in 1964 and a master of arts in government in 1965. He was awarded his doctor of jurisprudence (cum laude) from the University of Michigan in 1970 and his doctor of philosophy in foreign affairs from the University of Virginia in 1971. His professional military education includes the Judge Advocate Staff Officer Course, Staff Judge Advocate Course, Squadron Officer School, Air Command and Staff College, Industrial College of the Armed Forces (National Security Management Course), Naval War College (International Law Course), and Air War College. He also attended the 1977 Public International Law Course at the Hague Academy of International Law and the 1985 Law of War Course at the San Remo Institute for International Humanitarian Law.

Colonel Erickson entered the United States Air Force in 1971 with initial assignment to the legal staff of Headquarters Air University, Maxwell Air Force Base, Alabama. From 1973–75, he served as a faculty instructor in international law and editor in chief, *The Air Force Law Review*, at the Judge Advocate General School, US Air Force, also located at Maxwell Air Force Base. Thereafter, he served in numerous international law assignments at Headquarters United States Air Forces in Europe (USAFE), and Headquarters United States Air Force. Before arriving at

AUCADRE, he served as staff judge advocate, 7206th Air Base Group, Hellenikon Air Base, Greece, and as the senior US Defense Department attorney there.

He is a member of the bar of the state of Michigan. Colonel Erickson is also a member of the American Bar Association, American Society of International Law, American Branch of the International Law Association of Brussels, and the Federal Bar Association. He is author of *International Law and the Revolutionary State*, published by Oceana Publications in 1972, and numerous articles and other publications. He authored the initial draft of AFP 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*.

Colonel Erickson is married to the former Joan Kathryn Harmony of New London, Ohio. They have one daughter, Karen.

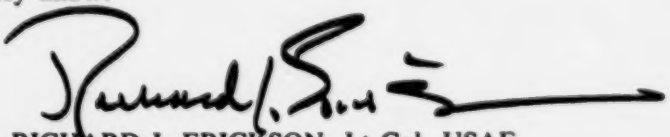
PREFACE

I thank Maj Gen Robert W. Norris, The Judge Advocate General, Headquarters United States Air Force, for the opportunity to research the subject of international law within the context of legitimating military force as an option in response to international terrorism. The study of the capacity of international law to meet the challenge of terrorism has been inadequate. In this study, I explore the full capacity of international law in this regard.

I would be remiss if I did not also express my appreciation to General Norris for his unwavering support and encouragement and for the valuable assistance provided to me by his staff. In particular, I thank Col Nolan Sklute, executive to The Judge Advocate General, and Col Robert Hitt, chief, International Law Division, Headquarters United States Air Force. I am grateful to several of Colonel Hitt's staff: Will Carroll, Lt Col Philip Meek, Lt Col Dennis Yoder, and Maj Thomas Tudor.

This study would not have been possible without the support of the Air University Center for Aerospace Doctrine, Research, and Education (AUCADRE). My thanks to Dr Lawrence Grinter, who as my research adviser, provided immeasurable and professional guidance and assistance. I am indebted also to Tom Lobenstein who served as my editor. Special thanks are due Dr Stephen Sloan, former senior research fellow, AUCADRE; Dr James Winkates, Air War College; Col Richard Porter, US Department of State, Office of Counter-terrorism; Lt Col Joe Ryan and the members of seminar five of the Air War College class of 1987; and Jane Gibish, bibliographer, Air University Library.

Most of all, I thank my wife, Joan, and my daughter, Karen, for reasons only they know.



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INTRODUCTION

THE RELEVANCE OF INTERNATIONAL LAW

Terrorism, whether international or translational, is not only a political problem; it is not only a psychological problem; it is not only a moral problem; it is, fundamentally, a legal problem.

Robert A. Friedlander

A reassessment of current legal systems to accommodate issues arising from the use of both international and domestic terrorism is needed.

Issue Paper No. 41, Vice President's Task Force on Combatting Terrorism

The Departments of State and Justice should encourage private and academic study to determine how international law might be used to hasten—rather than hamper—efforts to respond to an act of terrorism.

Public Report of the Vice President's Task Force on Combatting Terrorism

Proverbs 3:25 admonishes us to "be not afraid of sudden terror." Has the age of terrorism descended upon mankind? Clearly, in the contemporary world, terror knows no boundary and the world is its theater. International terrorism is a fact of international life. It ranks among the most important and the most controversial of all international law problems.

What Is This Study All About?

This study should help us as a nation deal with being uncertain as to how best to deal with the threat posed by terrorism. We do not understand international terrorism in an international law context. We tend to emphasize the inadequacies of international law in dealing with terrorism without fully comprehending the

usefulness of international law. We need an anchor for our thinking and for our actions. We need to return to basics, to grasp the fundamentals. We need to clarify in our own minds what our legal approach to international terrorism should be and what assumptions we must make in taking such an approach.

Both private and public studies, including one by the Vice President's Task Force on Combatting Terrorism, have called for an in-depth legal analysis of this social phenomenon. As members of a democratic society we are governed by the rule of law. Yet, we know so little about the role of law in combating international terrorism, which is both ironic and sad. We need to improve our intellect and sharpen our insight into such issues as: What is the legal responsibility of one state to another and to the international community concerning terrorism? How should terrorism be approached? Should it be considered a criminal activity in a law enforcement context or should it be viewed as a combatant activity in an armed conflict context? What legal reasoning exists to support the use of military force against international terrorists as well as their state sponsors and supporters?[1]

This study, written for both the lawyer and the lay person, explores these and other legal issues. For the benefit of the general reader, the text has been written with minimum reliance upon legal jargon. The legal scholar should refer to the endnotes for a more exhaustive legal treatment of concepts and issues. Chapter 1 looks at the nature of international terrorism and the seriousness of the threat. This chapter is important because it provides a foundation for judging what legal approach we should take to terrorism. It also examines some of the factors that we must consider in deciding on an appropriate legal basis for the employment of military force abroad in combating terrorism.

Chapter 2 addresses choice of law, reviewing the pros and cons of various legal approaches to dealing with terrorism. Should the approach be essentially law enforcement or should it be combatant? Should the challenge of international terrorism be viewed as a peacetime crisis or as a situation of armed conflict? Does the degree of state sponsorship or support make a difference?

Chapter 3 examines the much overlooked concept of state responsibility. State responsibility is the international law concept of the duty that one state owes to another in the international

community. States that sponsor or support terrorist activities against other states do so in disregard of their state responsibility. When this occurs what rights does the injured state acquire?

Chapters 4–6 form the core of the study. These chapters show how, throughout the twentieth century and culminating with the United Nations Charter, the international community has sought to restrain the use of force as a method for resolving international disputes. Today, only a limited number of circumstances justify the force option. These circumstances are contained in legal concepts or principles that, if satisfied, could serve as a rationale for legitimate use of military force abroad. Such principles include, for example, individual and collective self-defense, anticipatory self-defense, regional peacekeeping, protection of one's nationals, and invitation. This study examines the strengths and weaknesses of these and other principles as well as the degree to which the community of nations accepts each concept. The discussion identifies the set of factual conditions or circumstances that must exist if a state opts to rely on a particular principle of law. Appendix A summarizes 13 legal principles; it serves as a ready reference for decisionmakers. One must be cautioned not to use the appendix without first having read the commentary regarding each principle. To do so runs the risk of misunderstanding.

Chapter 7 summarizes the lessons learned and offers some thought about future directions. Finally, a detailed bibliography provides the reader with a starting point for further independent research.

What Is the Purpose of This Study?

In conducting military operations against international terrorists and their state sponsors or supporters, the United States is committed to democratic values, which rest in large measure upon the rule of law, including international law.[2] Operational international law is that body of treaty and customary international law that affects the otherwise unrestrained execution of military action. It reflects a community desire for restraint in the use of armed force. It necessitates legal advice in the planning of military operations. But what are the principles of international law that decisionmakers must consider?

The primary objective of this study is to identify those principles for the lawful use of military force. The study has two secondary purposes. The first is to review available legal approaches to terrorism. Should terrorism be treated as ordinary crime,[3] whether under domestic or international law,[4] or as unlawful combat and war crime under the law of armed conflict?[5] The second objective is to determine the current applicable international law of state responsibility.

This study provides decisionmakers with:

- A focus for further discussion and decision.
- An opportunity to rethink fundamentals such as the status of terrorists and the responsibility of those states that sponsor or support them.
- A clearer understanding of the legitimate use of military force abroad under current international law.
- A practical framework to evaluate proposed future use of military force in situational context.[6]
- An array of legal justifications so that the full potential of international law can be utilized.
- An appreciation for the realism (rather than the inadequacy) of international law.[7]

Limits of This Study

Not all aspects of law and terrorism are discussed in this study; such an endeavor would be too ambitious an undertaking. Rather this study more narrowly focuses on contemporary norms of international law for the use of overt military force abroad against international terrorists and their sponsors and supporters.

- This study surveys current international law but excludes attempts to project what the future directions in the law may be.
- This study does not examine proposals to make terrorism an international crime, to establish an international criminal court or an international police force, to create a common judicial area for prosecution of terrorists, or to develop innovative ideas for the development of international customary law.[8] Instead, the focus is on existing rules governing forcible response.

- The discussion includes legal rules or norms but excludes foreign policy and other nonlegal considerations bearing on the use or nonuse of force.[9]
- The study examines international law but excludes domestic law. Combating terrorism involves many domestic law issues that are beyond the scope of this study. Among the domestic law issues for the United States, for example, are the Posse Commodities Act, the War Powers Resolution, and other legislative initiatives to deal with terrorism.[10]
- The discussion examines the principles governing the legitimate use of military force but excludes other international law rules unrelated to this determination. Although status of forces agreements and landing and overflight privileges are important legal considerations in planning and executing military operations, they are not considered in this study because they address how a military operation can be properly accomplished and not whether the initial decision to use force is proper.[11] Also beyond the scope of this study are other modalities of projecting power such as diplomatic or economic action. This study focuses strictly on the use of force. Consequently, international initiatives to outlaw various terrorist acts and to enhance extradition and prosecution of terrorists are outside the purview of this work.[12]
- This study examines the overt use of military force but excludes covert operations. Since, within the United States government, covert operations are not the responsibility of the Department of Defense (DOD), they are not considered here.[13]
- The study includes a discussion of forcible action abroad but excludes forcible action at home. This study is concerned with the application of military force outside the territorial jurisdiction of a state against international terrorists and their state sponsors and supporters. Use of force against domestic terrorists within a state's own territory is essentially a law enforcement action governed by domestic law. Although this latter use of force could raise human rights and other legal issues, such use is beyond the scope of this study.

Having drawn the parameters of this study, a caveat is required. Even though an issue is beyond the scope of this study in itself,

it may be discussed to the extent of its ancillary impact upon the primary issues under consideration. This study looks at only one piece of a complex jigsaw puzzle. To fully understand that piece, it may be necessary to have some understanding of the pieces that surround it.

This Study, How Meaningful?

States combating terrorism, including the United States, are increasingly opting to use military force. One need only recall the Israeli raid on the Beirut airport in 1968; the hostage rescue missions to Entebbe in 1976, Mogadishu in 1977, and Tehran in 1980; the Israeli raid on the Iraqi nuclear reactor in 1981, and the *Achille Lauro* incident of 1985, the US raid on Libya in 1986, and the Israeli raid on Tunis in 1987. As a consequence, understanding international norms applicable to the legitimate use of force has become more relevant and pertinent. A hostage rescue mission in the overseas environment is one use of force. But use of military force is not restricted to such operations as the April 1986 raid on Libya reminds us. The announced United States policy of active defense portends future uses of military force in ways perhaps not previously imagined.

How did we arrive at this juncture? Frustration has driven us here. As terrorist expert Brian Jenkins of the Rand Corporation has noted, "confronted with terrorist violence from abroad, and frustrated by the lack of international cooperation, national governments are more likely to take direct military action."[14] Frustrations and failures in the international arena have led like-minded Western states, including the United States, to turn to the military option as a last resort in combating this threat.

Lack of international cooperation in this area has a long history. Following the assassination of King Alexander of Yugoslavia and French foreign minister Louis Barthou in Marseilles on 9 October 1934, the Council of the League of Nations appointed a committee of experts to draw up a preliminary draft of an international convention to assure repression of conspiracies or crimes committed with a political or terrorist purpose.[15] The result was the

1937 Convention on Terrorism, which only one state, India, ratified and which never entered into force.

The United Nations record is also one of frustration for the West. After the massacre of the Israeli Olympians in Munich in 1972, the United States introduced in the United Nations a draft convention on terrorism. The UN secretary general also asked the UN General Assembly to add to its agenda at its 27th session "measures to prevent terrorist and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms."[16] According to Judge Abraham Sofaer, US Department of State legal adviser, "the Secretary-General's statement evoked angry opposition, which took the immediate form of protests against considering terrorism without considering its causes."[17] Two fundamentally opposing views exist in the United Nations on the issue of terrorism: one focusing on acts and the other on causes. The former views terrorism as evil irrespective of cause. The latter sees terrorism as good or evil depending on the cause in whose service it is employed. This latter view also considers efforts to outlaw terrorism as an indirect way of attempting to restrain national liberation movements. The United States and other Western democracies take the first view. The third world, supported by the Soviet Union and its followers, takes the second.[18]

Even though the United Nations failed to reach agreement on the proposed United States draft general convention on terrorism or to take meaningful action on the secretary general's proposed agenda item, it did manage to complete work on two specialized conventions: the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents,[19] and the 1979 International Convention on Hostage Taking.[20] Yet, these and other conventions concerning aerial hijacking and letter bombs, for example, have not produced a solution to the terrorist problem. Several factors have worked to slow progress toward this end.

First, many of the specialized conventions are watered down by conditional language. For example, the 1973 Convention on the Prevention and Punishment of Crimes against Protected Persons is annexed to UN General Assembly Resolution 3166, 28th

session, which provides "that the provisions of the annexed convention could not in any way prejudice the exercise of the legitimate right to self-determination and independence . . . by peoples struggling against colonialism, alien domination, foreign occupation, racial discrimination (including Zionism) and apartheid."[21] Second, many states that actively sponsor or support terrorism are not parties to these conventions. Third, the conventions fail to provide any viable enforcement mechanism. Extradition, where provided, is subject to the "political offense" escape clause and punitive sanctions are lacking.[22] Brian Jenkins summarizes the political climate as follows: "The world will not simply outlaw international terrorism. . . . We should not be overoptimistic in regard to obtaining and enforcing international agreements."[23]

This same lack of consensus that contributes to ineffective international rule making underlies the failure of the UN Charter's general enforcement machinery to ensure international peace and security. When established in 1945, a great assumption was made that the great powers would continue to work together in the postwar era. Due to great power rivalry and the exercise of the veto power, "the military enforcement machinery contemplated by the UN Charter to enforce its rule against shooting first was never created. . . . The Security Council does not provide reliable central authority to enforce the rule against first use of force."[24] The General Assembly has only powers of recommendation. Even if the General Assembly could act forcefully, its members are divided and its resolutions are replete with language strongly supporting the actions of national liberation movements while refusing to condemn terrorism per se.[25] This record has led Western scholars to conclude that "the United Nations is, for the most part, useless in combating terrorism."[26] This disdain of the United Nations is a theme that surfaces from time to time in this study. In particular, it becomes an argument for reinterpretation of the UN Charter's provisions on the use of force.

This lack of international cooperation has not been limited to the United Nations. The International Criminal Police Organization (Interpol) constitution provides in article 3 that "it is strictly forbidden for the organization to undertake any intervention or

activities of a political, military, religious or racial character."[27] Arab membership and this constitutional limitation have reduced the organization's effectiveness in countering terrorism. Many of its functions regarding collating and distributing of information have been assumed by the West German government's antiterrorism computer center in Wiesbaden.[28] Terrorism, viewed as a political expression, has had an adverse impact on Interpol. The great irony is that terrorist groups seem better able to cooperate than governments have.

The international arena has seen some successes. The cooperation among the industrialized Western democracies that make up the "summit seven" (United States, Canada, the United Kingdom, France, West Germany, Italy, and Japan) is noteworthy.[29] So is the 1977 European Convention on the Suppression of Terrorism, which entered into force on 4 August 1978 for all members of the Council of Europe except Ireland and Malta. This convention "removes the traditional 'political offence' safeguard in extradition for crimes of hijacking or other offences against aircraft, serious attacks on internationally protected persons, kidnapping, taking of hostages and offences involving the use of explosives or firearms if these endanger persons."[30]

But these and other limited successes have been insufficient to meet the challenge of terrorism. States have increasingly turned to unilateral action, including the use of military force. The aim is deterrence[31] and "military force must always be one option."[32] Israel, West Germany, the United Kingdom, the United States, and others have used and, in all likelihood, will again use the force option. The ideal objective is a consistent policy of maximizing risks to terrorists and their sponsors and supporters while minimizing their potential rewards. In the words of the late William J. Casey, former director of the Central Intelligence Agency (CIA), "perpetrators and sponsors of terrorist acts must be held accountable for their deeds."[33] Use of force is one method of achieving accountability.

To achieve deterrence and accountability, the Reagan administration has shifted US policy from a passive to an active response to terrorism.[34] National Security Defense Directive (NSDD) 138, 3 April 1984, endorses "active defense" through

the preemptive use of military force.[35] In implementing the final report of the vice president's task force, NSDD 207 (20 January 1986) provides for an active national strategy to combat terrorism.[36] Secretary of State George Shultz described the active defense policy thusly:

> It is time to think long, hard, and seriously about more active means of defense, about defense through appropriate preventive or preemptive actions against terrorist groups before they strike. One of the best deterrents to terrorism is the certainty that swift and sure measures will be taken against those who engage in it. Resort to arms in behalf of democracy against repressive regimes or movements is indeed a fight for freedom, since there may be no other way that freedom can be achieved.[37]

Brian Jenkins noted that "an active defense meant the use of military force."[38] William Casey confirmed that "we must be free to consider an armed strike against terrorists and those who support them, where elimination of the threat does not appear to be feasible by any other means."[39] An active defense policy, relying as it does on the military option, emphasizes the importance of understanding international law norms on the use of force.

International Law, Why Bother?

Some believe that international law is nothing more than irrelevant legal hocus-pocus. They believe that when it comes to power politics, the law of nations is not germane. Of what relevance is international law? Why should we care about it? In addition to the stated US policy to comply with international law, other important reasons exist as to why international law is applicable to the conduct of military operations by the United States.

First, as stated by Justice Horace Gray in *Paquette Habana*, "international law is part of our law."[40] The US Constitution, article I, section 8, clause 10 and article III, section 2, recognizes that the United States is subject to international law and Congress has the power to define offenses under the law of nations. From the very beginning of our federal republic, US courts have treated customary international law as an integral part of the law of the United States. As Prof Louis Henkin, Columbia University, states,

"international law is not merely law binding on the United States internationally but it is also incorporated into United States law."[41] Violation of international law becomes a breach of US law that can have a significant impact on us as a nation and as individuals.

International treaty law is also US law, but it is treated somewhat differently. The Constitution, article VI, clause 2, provides that "all treaties made, or which shall be made, under the Authority of the United States" are, like federal laws, the supreme law of the land. Consequently, all laws and treaties of the United States are supreme over state laws, but of equal status to one another. Thus, a US law passed after a treaty takes effect may prevail over that treaty without violating the Constitution. Moreover, since the president has the constitutional capacity to unilaterally denounce a treaty, such action could not be challenged in US courts. In these circumstances, US law would not be violated even though international law would be, and the United States could be held accountable by the international community for such action. The important point to recognize is that customary international law, unlike treaty law, is inherently part of US law and always applies. Customary law provides the great body of international legal norms relative to the use of military force. Even those principles concerning the use of force as are contained in the United Nations Charter, articles 2(4) and 51, are now generally considered by legal scholars as having become customary international law. Moreover, no matter what the status of treaty obligations of the United States may be under our law, such obligations bind the United States internationally until properly terminated in accordance with the law of nations.

Second, democratic societies are established on the rule of law, and compliance with international law is fundamental to American tradition. In the eloquent words of Abram Chayes, former State Department legal adviser,

> A nation which professes to live by the rule of law invites a sure penalty, sometimes more swiftly than by the judgment of a court, if it turns from the path of the law. For us and our associates, moreover, whether we will profess to live by the law is not an issue of policy on which we have alternatives. The answer is inherent in our national tradition, in our culture, and it is implied in the purposes for which we strive in the world.

> It is implicit in our avowal at birth of "a decent respect for the opinions of mankind." Thus it seems to me we will have a hard time in developing a doctrine as to the use of force which will permit us to be judge in our own case.[42]

Combating terrorism accents this issue as terrorists seek to have established governments overreact, acting outside the law as terrorists themselves do, thereby undermining the legitimacy of the government itself.[43]

Third, conduct consistent with international norms provides governments with the moral and legal high ground for dealing with terrorism. Failure to comply with the law will result in loss of government support at home and abroad. In the words of Prof Oscar Schachter, Columbia University Law School, "states require a basis of legitimacy to justify their actions. . . . Power and interest are not superceded by law, but law cannot be excluded from the significant factors influencing the uses of power and the perception of interests."[44]

Fourth, and finally, the United States complies with international law because it is in its national self-interest to do so. The reasons discussed above are indicative, in part, of that self-interest. Also, the United States has an interest in preserving the status quo and the international legal order. To the extent that the United States undermines the law, it undermines international order and those vital interests.[45]

NOTES

1. For a discussion of the terms *terrorism, international terrorism, state-sponsored terrorism,* and *state-supported terrorism,* see chapter 1.

2. International law is

> the standard of conduct, at a given time, for states and other entities subject thereto. It comprises the rights, privileges, powers, and immunities of states and entities invoking its provisions, as well as the correlative fundamental duties, absence of rights, liabilities and disabilities. International law is, more or less, in a continual state of change and development.

Department of State, Office of the Legal Adviser, *Digest of International Law,* vol. 1, ed. Marjorie M. Whiteman (Washington, D.C.: June 1963), State Department, 7403.

Article 38(1), *Statute of the International Court of Justice*, annexed to the *Charter of the United Nations*, identifies the primary sources of international law as (a) "international conventions [treaties], whether general or particular, establishing rules expressly recognized by the contesting states," (b) "international custom, as evidence of a general practice accepted as law," and (c) "the general principles of law recognized by civilized nations." The statute also identifies the "subsidiary means for the determination of [international] law as (a) judicial decisions and (b) the teachings of most highly qualified publicists." "Charter of the United Nations," 26 June 1945, *Statutes at Large*, vol. 59: 1031; United States Treaty Series (TS), 993; Department of State, *Treaties and Other International Acts Series* (TIAS), 5857; Department of State, *Treaties and Other International Agreements of the United States, 1776–1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 3, *Multilateral, 1931–1945*, 1153.

3. The term *ordinary crime* as used in this study applies to all criminal acts other than those that arise in time of armed conflict, namely, war crimes and grave breaches of international law.

4. In this study, the term *domestic law*, sometimes referred to as municipal law, refers to the law internally created by sovereign states as contrasted to international law.

5. The term *law of armed conflict* encompasses "the international law regulating the conduct of states and combatants engaged in armed hostilities, often termed the law of war." Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, November 1976, para. 1-2b.

6. The vice president's task force recognized the need for a framework for decisionmaking and recommended that

> the Interdepartmental Group on Terrorism should prepare, and submit to the NSC [National Security Council] for approval, policy criteria for deciding when, if and how to use force to preempt, react and retaliate. This framework will offer decisionmaking bodies a workable set of standards by which to judge each terrorist threat or incident.

Vice President, *Public Report of the Vice President's Task Force on Combatting Terrorism* (Washington, D.C.: February 1986), 22.

7. Many scholars and jurists have focused on the inadequacy of international law in the face of the terrorist challenge, not the least of which has been Judge Abraham D. Sofaer, the Department of State legal adviser. He has written, "The law, as presently formulated cannot reasonably be expected to repress international terrorism." Sofaer, "Terrorism and the Law," *Foreign Affairs* 64, no. 5 (Summer 1986): 922. See also Fehmy Saddy, "International Terrorism, Human Rights, and World Order," *Terrorism: An International Journal* 5, no. 4 (1982): 325-51; and Grant Wardlaw, *Political Terrorism: Theory, Tactics and Counter-Measures* (Cambridge, England: Cambridge University Press, 1982), 120.

One of the central themes of the present study is that the inadequacy that many observers feel exists in international law is merely the reflection of the current state of international relations. The frustration of Judge Sofaer and others is with the inability of states to achieve consensus for future development of international law. International law can only develop as nation-states are willing to allow it to do so. No world government exists to legislate. In this sense international law is a practical expression of the art of the possible in a world composed of independent sovereign states. This state of affairs is the realism of international law.

International law may not be as inadequate as some believe, however. Concepts of international law such as choice of law (chapter 2) and state responsibility (chapter 3) offer interesting possibilities that deserve greater attention, as do the principles concerning the use of force in contemporary international law (chapters 4–6). As Prof Harry E. Almond, Jr., National Defense University, has written,

> Accordingly, it must be concluded that with respect to the use of force, the loopholes in the law are not substantial. More difficult is the policy question: establishing community policy among states, state commitments to that policy, and support of states when force is used.

Almond, "Using Law to Combat Terrorism," in *Fighting Back: Winning the War against Terrorism*, ed. Neil C. Livingstone and Terrell E. Arnold (Lexington, Mass.: D. C. Heath and Co., 1986), 171. Prof Shabtai Rosenne offers these encouraging words: "international law, like all law, is common sense writ large." Rosenne, "International Law and the Use of Force," *US Naval War College International Law Studies* 62 (1980): 8.

8. For more detail on the efforts to make terrorism a crime, see the records on Convention for the Punishment and Prevention of Terrorism, opened for signature at Geneva, 16 November 1937, League of Nations, C.94.M.47.1938.V. The general view at present is that efforts to criminalize specific acts that terrorists commit have greater hope for success than would making terrorism itself a crime. In this regard, see the work of the International Law Association (ILA), Committee on International Terrorism, "International Terrorism," *Report of the Fifty-Sixth Conference Held at New Delhi* (Great Britain: 1976), 155–77; "International Terrorism," *Report of the Fifty-Seventh Conference Held at Madrid* (Great Britain: 1978), 119–41; "International Terrorism: Third Interim Report of the Committee," *Report of the Fifty-Ninth Conference Held at Belgrade* (Great Britain: 1982), 495–519; "International Law: Fourth Interim Report of the Committee," *Report of the Sixtieth Conference Held at Montreal* (Great Britain: 1983), 349–57; and "Terrorism: Final Committee Report," *Report of the Sixty-First Conference Held at Paris* (Great Britain: 1985), 313–22. For comments on the work of the ILA generally, see *Terrorism: An International Journal* 7, no. 2 (1984).

On the efforts to establish an international criminal court, see Convention for the Creation of an International Criminal Court, opened for signature at

Geneva, 16 November 1937, C.94.M.47.1938.V. For a contemporary discussion of the issue, see M. Cherif Bassiouni, ed., *International Terrorism and Political Crimes*, 3d Conference on Terrorism and Political Crimes, 1973 (Springfield, Ill.: Charles C. Thomas for International Institute for Advanced Criminal Sciences, 1975). Regarding the possibility of such a court, this author agrees with Prof Kay Hailbronner of the Federal Republic of Germany, who states: "I think there is no chance whatever of reaching agreement on that." Hailbronner quoted in ILA, "International Terrorism," *Report of the 56th Conference*, 118.

For comments on efforts to create an international force to combat terrorism, see "Terrorism: International Force the Best Way to Fight It," editorial, *Fort Worth Star-Telegram*, 1 May 1986, reprinted in "Special Edition—Terrorism" published by the Air Force News Clipping and Analysis Service, 3 July 1986, 38. In the present study, the author agrees with Grant Wardlaw (p. 103): "The diplomatic and political implications of, for example, an international anti-terrorist strike force are such that suggestions of this kind are never likely to be translated into reality."

On the efforts to establish a special jurisdiction and legal process for terrorism, see Paul Wilkinson's discussion of French president Valery Giscard d'Estaing's suggestion of creating a European judicial zone. Wilkinson sees progress in this area as unlikely. Wilkinson, "Proposals for a Liberal-Democratic Government Response to Terrorism and Low-Intensity Violence at Domestic and International Levels," in *Terrorism and Beyond: An International Conference on Terrorism and Low-Level Conflict*, ed. Brian M. Jenkins (Santa Monica, Calif.: Rand Corp., December 1982), 220-23, Rand, R-2714-DOE/DOJ/DOS/RC.

Concerning the development of new customary rules, see article 38(1) of the *Statute of the International Court of Justice*, which provides that international custom is "evidence of general practice accepted as law." Two basic conditions are required to create customary law: the practice of states (material element) and the belief that the practice has been accepted as law (the psychological element referred to as *opinion juris sive necessitatis*). This second element distinguishes customary international law from international comity or courtesy (*comitas gentium*). The possibilities of developing customary law, as distinguished from conventional or treaty law, in meeting the challenge of terrorism may have potential. Further research into this area of the law is needed.

9. International law is but one factor to consider in making a foreign policy decision to use military force. As Brian Jenkins notes,

> How many incidents are likely to warrant a military response? Very few, judging by the historical record. . . . Nor is the United States likely to carry out military operations on the territory of the Soviet Union or Eastern Europe. . . . Military operations in response to terrorism are likely to involve a handful of hostile countries in the Third World where the United States has incontrovertible evidence that agents in the employ of a government

> have carried out a terrorist attack, that a government has instigated a terrorist attack or permitted one to occur through wilful negligence, or that a government is able to bring the perpetrators to justice but refuses to do so. If we apply these criteria . . . a military response might have been contemplated in only a handful of episodes—less than one percent.

Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984, 6. See also Department of the Army, Training and Doctrine Command, *Joint Low-Intensity Conflict Project*, vol. 1, *Analytical Review of Low-Intensity Conflict* (Fort Monroe, Va.: August 1986), chap. 6.

For a discussion that the use of force is likely in the event of nuclear terrorism, see Forrest R. Frank, "Nuclear Terrorism and the Escalation of International Conflict," *US Naval War College International Law Studies* 62 (1980): 539. Another likely occasion for the use of force is in rescue operations. See Gail Bass et al., *Options for U.S. Policy on Terrorism* (Santa Monica, Calif.: Rand Corp., 1981), 6, Rand, R-2764-RC.

The announced United States policy is to use armed force only in compliance with international law. Robert C. McFarlane, former assistant to the president for national security affairs, described the elements of the US active defense policy toward terrorism to the Defense Strategy Forum on 25 March 1985. One element was: "State-sponsored terrorism consists of acts hostile to the United States and 'must be resisted by all legal means'." Quoted in Almond, 168–69. This US policy was reaffirmed, in relevant part, as follows: "The U.S. Government considers the practice of terrorism by a person or group a potential threat to its national security and will resist the use of terrorism *by all legal means available*" (emphasis supplied). Vice President, *Report on Combatting Terrorism*, 7.

10. *Posse Comitatus Act*, *US Code*, Title 18, sec. 1835; 1981 amendment at *US Code*, Title 10, secs. 371–378. For a discussion, see William Regis Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (Boulder, Colo.: Westview Press, 1982). *War Powers Resolution*, *US Code*, Title 50, secs. 1541–1548 (PL 93-148).

The United States has enacted specific domestic legislation in direct response to terrorism. See *An Act for the Protection of Foreign Officials and Guests of the United States*, *US Code*, Title 18, secs. 112, 878, 970, 1116, 1117, and 1201 (PL 92-539); *US Code*, Title 18, sec. 1203, makes criminal the taking of US hostages worldwide; *US Code*, Title 18, sec. 3077, authorizes the attorney general to pay rewards for terrorism suppression; *Foreign Intelligence Surveillance Act* (FISA), *US Code*, Title 50, sec. 1801 et seq.; and Antihijacking Act (PL 93-366).

11. The 15 April 1986 US raid on Libya provides an example of how important landing and overflight rights can be to a military operation. For a brief discussion of the United Kingdom's authorization to allow US forces to depart on the mission, see James M. Perry, "Thatcher Draws Harsh Criticism by Labour, European Allies for Sanctioning Libya Strike," *Wall Street Journal*,

European edition, 16 April 1986, 4. Concerning overflight rights, see James M. Markham, "German Voices Doubts on Qaddafi Terror Role," *New York Times*, 2 September 1986, 8.

12. Regarding aerial hijacking, see "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation" (Montreal Convention), 23 September 1971, TIAS 7570, Department of State, *United States Treaties and Other International Agreements* (UST), vol. 24, pt. 1, 564; "Convention for the Suppression of Unlawful Seizure of Aircraft" (Hague Convention), 16 December 1970, TIAS 7192, UST, vol. 22, pt. 2, 1641; and "Convention on Offenses and Certain Other Acts Committed on Board Aircraft" (Tokyo Convention), 14 September 1963, TIAS 6768, UST, vol. 20, pt. 3, 2941; United Nations Treaty Series (UNTS), *Treaties and International Agreements Reported and Filed or Recorded with the Secretariat of the United Nations*, vol. 704 (1969), no. 10106, 219.

On hostage taking, see "Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance," 2 February 1971, TIAS 8413, UST, vol. 21, pt. 4, 3949; Organization of American States (OAS), AG/88/rev.; and "International Convention against Taking of Hostages," 17 December 1979, UN A/34/819 (1979).

Regarding letter bombs, see "Universal Postal Convention," 10 July 1964, TIAS 5881, UST, vol. 16, pt. 2, 1291. For a discussion of this convention, see L. C. Green, "International Law and the Control of Terrorism," *Dalhousie Law Journal* 7, no. 2 (April 1983): 244.

Regarding diplomats, see "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents" (New York Convention), 14 December 1973, TIAS 8532, UST, vol. 28, pt. 2, 1955.

Requests regarding extradition may be denied on the basis of the political offense exception. Although the basic rule in international law is cooperation among states with respect to fugitives from justice, an exception to this rule for political offenses arose during the eighteenth-century revolutions for political freedom and liberty. How broadly the exception is interpreted is open to dispute. Some argue that it should extend only to those whose extradition is sought for exercising political freedoms such as free speech. Others argue that it extends to any political statement, such as violence in furtherance of one's political cause. This issue takes on significance in the context of terrorism. If one assumes the broad view of the political offense exception, then one must agree with Noemi Gal-Or, who argues that "the problem of determining the political character of the political terrorist offence is non-existent. Such an offence is by definition a political offence par excellence. . . . The terrorist offence always fits into some theoretical category of political offence." Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin's Press, 1985), 136.

A broad view would inhibit greatly extradition of terrorists to stand trial in countries where they committed their acts. Recently the United States and the United Kingdom concluded a supplement to their extradition treaty narrowing the political offense exception. Much remains to be done in this area. For a general discussion, see Department of State, Bureau of Public Affairs, "The Political Offense Exception and Terrorism," statement by Abraham Sofaer, legal adviser, Department of State, before the Senate Foreign Relations Committee, 1 August 1985, Current Policy 762.

13. Another related issue concerns assassination. For US guidance, see Executive Order 12333, US Intelligence Activities, 4 December 1981, *Code of Federal Register* (CFR), Title 3, The President, 1981 Compilation, 200; Christopher Dobson and Ronald Payne, *Counterattack: The West's Battle against the Terrorists* (New York: Facts on File, 1982), xv–xvi; and Brian Jenkins, "Assassination: Bad Policy, Morally and Logically," *Alabama Journal–Montgomery Advertiser*, 16 November 1986, 5(B).

14. Brian Michael Jenkins, "Research Note: Rand's Research on Terrorism," *Terrorism: An International Journal* 1, no. 1 (1977): 92.

15. A concise history of the steps leading to the 1937 Convention for the Prevention and Punishment of Terrorism is in *Proceedings of the International Conference on the Repression of Terrorism*, League of Nations, C.94.M.47.1938.V (1938.V.3), 49–50. See also Maj William R. Farrell, USAF, "Terrorism Is . . . ?" *Naval War College Review* 32, no. 3 (May–June 1980): 65; Seymour Maxwell Finger, "International Terrorism and the United Nations," in *International Terrorism: National, Regional and Global Perspectives*, ed. Yonah Alexander (New York: Praeger Publishing, 1976), 323; Thomas M. Franck and Bert B. Lockwood, Jr., "Preliminary Thoughts toward an International Convention on Terrorism," *American Journal of International Law* 68, no. 1 (January 1974): 69–70; and Robert A. Friedlander, *Terror-Violence: Aspects of Social Control* (New York: Oceana Publications, 1983), 87.

16. UN General Assembly, Official Records (UN GAOR), 27th sess., A/8791 (1972).

17. Sofaer, 903.

18. The breadth of the gap is illustrated by the remarks of delegates speaking in behalf of the third world position during the UN Sixth (Legal) Committee meetings. Guinea supported the right of national liberation movements "to undertake any type of action to assure that their countries attain independence." UN Sixth (Legal) Committee, 1362d meeting, UN GAOR, 27th sess., A/C.6/SR.1362 (1972), 16. The Cuban representative noted that "the methods of combat used by national liberation movements could not be declared illegal while the policy of terror unleashed against certain peoples was declared legitimate." UN Sixth (Legal) Committee, 1358th meeting, UN GAOR, 27th sess., A/C.6/SR.1358 (1972), 11. The Madagascar representative said that "acts of terrorism inspired by base motives of personal gain were to be con-

demned. Acts of political terrorism, on the other hand, undertaken to vindicate hallowed rights recognized by the United Nations, were praiseworthy. It was, of course, regrettable that certain acts in the latter category affected innocent persons." UN Sixth (Legal) Committee, 1365th meeting, UN GAOR, 27th sess., A/C.6/SR.1365 (1972), 14.

The UN Sixth (Legal) Committee recommended to the UN General Assembly that a 35-member ad hoc committee on terrorism be formed. The committee met from 16 July through 10 August 1973. That it failed to provide more than a summary of divergent views and that it was unable to produce a draft convention should come as a surprise to no one. For a discussion of the committee's lack of success, see Wardlaw, 109. According to Franck and Lockwood (p. 72), the committee did not produce a recommendation since "serious study of the causes of terrorism is a long term project." The committee reconvened on 14 and 25 March 1977, but again met without result and its report reflected the divergent opinions of its member countries. See Wardlaw, 110.

19. New York Convention.

20. UN Convention against Taking Hostages. For a discussion of this convention, see Green, 252–54.

21. UN General Assembly, "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents," 14 December 1973, Resolution 3166, UN GAOR, 28th sess., supp. 30, A/9030 (1973), 146.

22. See Farrell, "Terrorists," 66–67; David L. Milbank, "International and Transnational Terrorism: Diagnosis and Prognosis," in *Contemporary Terrorism: Selected Readings*, ed. John D. Elliott and Leslie K. Gibson (Gaithersburg, Md.: International Association of Police Chiefs, 1978); and Paul Wilkinson, *Terrorism and the Liberal State* (New York: John Wiley and Sons, Halsted Press, 1977), 221.

23. Brian Michael Jenkins, "A Strategy for Combatting Terrorism," Rand, 6624, Rand Corp., Santa Monica, Calif., May 1981, 7-8. Or, as noted by Manuel R. Garcia-Mora,

> punishing terrorists is further complicated by the fact that no government is really willing to punish individuals when in so doing its political interests might be jeopardized. This observation is even more compelling in situations where a state avails itself of the activities of private persons to promote its international objectives.

Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Netherlands: Martinus Nijhoff, 1962), 195.

24. George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review* 39, no. 3 (May–June 1986): 71.

25. See, for example, UN General Assembly "Basic Principles of the Legal Status of the Combatants Struggling against Colonial and Alien Domination and Racist Regimes," 12 December 1973, Resolution 3103, UN GAOR, supp.

30, 28th sess., A/9030 (1973). The issue of the struggle of national liberation movements is central to the UN arena and the desire of the third world to press for consideration of the cause before condemning the act. The problem is, of course, that one group's national liberation is another's aggression. It also brings back into the law the concept of just war, which has long since been discarded. In this latter regard Prof John Norton Moore writes that the argument for national liberation movements is:

> nothing more than the old "just war" notion resurrected in the modern setting of the post-Charter period, and it violates that judgmental decision made by the framers of the Charter that war in the modern world is too destructive to allow social change to be brought about in international relations through the use of force.

Moore, "Legal Standards for Intervention in Internal Conflicts," *Georgia Journal of International and Comparative Law* 13, supp. (1983): 196. See also Richard R. Baxter, "The Geneva Conventions of 1949 and Wars of National Liberation," in Bassiouni; Lt Col Frances T. Symes, USAF, "Terrorism and the Amended Law of War," student research paper (Maxwell AFB, Ala.: Air War College, 15 June 1982), 7–8; and Edward McWhinney, "International Terrorism: United Nations Projects for Legal Controls," *Terrorism: An International Journal* 7, no. 2 (1984): 175–84.

Of what legal effect are United Nations resolutions? Generally speaking, they have no binding authority. However, to the extent that they express the will of the international community, they may have authority. In this regard the West ought to be gravely concerned about the course of events in the UN General Assembly and about the content of General Assembly resolutions. They could impact on the development of customary international law in a manner adverse to the foreign policy interests of the United States and the West. For a discussion of General Assembly resolutions, see Jorge Castaneda, *Legal Effects of United Nations Resolutions* (New York: Columbia University Press, 1969), and "Report of the Committee on Use of Force in Relations among States," in ILA, American Branch, *1985–86 Proceedings and Committee Reports* (New York: ILA, American Branch, 1986), 191.

26. Neil C. Livingstone and Terrell E. Arnold, "Democracy under Attack," in *Fighting Back*, ed. Livingstone and Arnold, 9. See also Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 57; Gayle Rivers, *The War against the Terrorists: How to Win It* (New York: Stein and Day, 1986), 225; and Paul Wilkinson, "Can a State Be a 'Terrorist'?" *International Affairs* 57, no. 3 (Summer 1981): 468.

27. Interpol constitution quoted in Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 68.

28. See Dobson and Payne, xx.

29. See Vice President, *Report on Combatting Terrorism*, 12.

30. United Kingdom, Foreign and Commonwealth Office, "International Reaction to Terrorism," background brief, January 1986, 5.

31. "Our goal," in the words of Secretary of State Shultz, "must be to prevent and deter future terrorist acts." George P. Shultz, "Terrorism and the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 442. See also Netanyahu, "Terrorism: How the West Can Win," 50; Jeffrey A. Sheehan, "The Entebbe Raid: The Principle of Self-Help in International Law as a Justification for State Use of Armed Force," *Fletcher Forum* 1 (Spring 1977): 152–53; Paul Wilkinson, "Proposals for Government and International Responses to Terrorism," *Terrorism: An International Journal* 5, nos. 1–2 (1981): 161–93; and Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Report on "State-Sponsored Terrorism,"* 99th Cong., 1st sess., June 1985, Senate print 99–56, 74–75.

32. Wilkinson, "Responses to Terrorism," 192–93.

33. William J. Casey, "International Terrorism: Potent Challenge to American Intelligence," address at Fletcher School of Law and Diplomacy, Tufts University, Medford, Mass., 17 April 1985, in *Terrorism*, ed. Steven Anzovin, The Reference Shelf, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 69; reprinted from *Vital Speeches* 51, no. 23 (15 September 1985).

34. According to Secretary Shultz "a purely passive defense does not provide enough of a deterrence to terrorism and the states that sponsor it." George P. Shultz "Terrorism: The Challenge to Democracy," address to the Jonathan Institute's Second Conference on International Terrorism, Washington, D.C., 24 June 1984, in Anzovin, 58; reprinted from *Department of State Bulletin* 84, no. 2089 (August 1984). On 9 July 1986, Secretary Shultz stated further, "We have to be willing to do something about it in an active way . . . and terrorists should know and states that support terrorists should know that the United States will take action and therefore they don't operate in a cost-free environment." Department of State, "Remarks and Q&A Sessions by the Honorable George P. Shultz, secretary of state, before Foreign Press Center seminar, Countering State Supported Terrorism," Press Release 147, 9 July 1986, 4. See also Casey, 70–71; McFarlane, quoted in Almond, 168–69; and Vice President, *Report on Combatting Terrorism*, 7.

35. For discussion of NSDD 138, see Jenkins, "Combatting Terrorism Becomes a War," 4; Lt Col James P. Terry, USMC, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May–June 1986): 59; David C. Morrison, "The 'Shadow War'," *National Journal* 18, no. 19 (10 May 1986): 1100; and Stephanie L. Nall, "Move on Terrorism Ordered by Reagan," *Washington Times*, 16 April 1984, 1.

36. For a discussion of NSDD 207, see US Army, *Analytical Review*, 8–3.

37. George P. Shultz, *Washington Post*, 25 June 1984, 1(A).

38. Jenkins, "Combatting Terrorism Becomes a War," 3.

39. Casey, 70.

40. *Paquette Habana*, 175 US 677 (1900), 700.

41. Louis Henkin, "International Law as Law in the United States," *Michigan Law Review* 82 (April–May 1984): 1561.

42. Abram Chayes, "International Law Issues: The Opposition Position," in *The Cambodian Incursion: Legal Issues; Proceedings of the Fifteenth Hammarskjöld Forum*, ed. Donald T. Fox (Dobbs Ferry, N.Y.: Oceana Publications for the Association of the Bar of New York City, 1971), 41.

43. See Lloyd N. Cutler, "The Right to Intervene," *Foreign Affairs* 64, no. 1 (Fall 1985): 96–97; and Wilkinson, *Terrorism and the Liberal State*.

44. Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April–May 1984): 1623–24. See also Livingstone and Arnold, "Democracy under Attack," 8; and Edward Marks and Debra van Ostpal, eds., *Combating Terrorism: A Matter of Leverage* (Washington, D.C.: Georgetown University Center for Strategic and International Studies, June 1986), 16–18.

45. See Francis A. Boyle, "The United Nations Charter and the Iranian Hostage Crisis," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 537–39; and Stanley Hoffmann, "International Law and the Control of Force," in *The Relevance of International Law*, ed. Karl Deutsch and Stanley Hoffmann (Cambridge, Mass.: Schenkman Publishing Co., 1968), 21–46.

CHAPTER 1

WHAT IS TERRORISM AND HOW SERIOUS IS THE THREAT?

> The purpose of terror is to terrorize.
>
> V. I. Lenin

> The one means that wins the easiest victory over reason: terror and force.
>
> Adolf Hitler

> The lesson is that America was kicked out of Lebanon when an individual Arab was able to kill 300 Americans—An armed people will never be defeated, but regular armies are unreliable.
>
> Mu'ammar al-Qadhafi

As discussed in the next chapter, international law offers two distinct approaches to managing terrorism: law enforcement and the law of armed conflict.[1] Whether either approach is appropriate is another question; whichever is best will depend in large measure on the nature of the terrorist challenge. We must understand the challenge of terrorism before we can assess the suitability of a response.

This chapter provides the foundation for that understanding. In this chapter we determine as best we can what terrorism is and how serious the threat is. We seek answers to questions such as: Is terrorism a minor nuisance or a significant threat to national security? Is it likely to be a temporary or an enduring problem? What factors should be considered in evaluating this threat? Some of these questions cannot be answered completely. However, to the extent that we must make assumptions about terrorism, we must identify them clearly. By distinguishing between knowledge and assumption, decisionmakers will have a clearer understanding of the issues and the alternative courses of action.

To provide this clear framework for decisionmaking, this chapter pursues the following line of reasoning: What is terrorism? How does international law define terrorism? What other terminology must we understand? What is international terrorism? In what ways do states involve themselves with terrorists? What distinguishes between state sponsorship, state support, state toleration, and state inaction? How serious is the terrorist threat? Is it a recent threat or does it have historical antecedents? Do statistics support the conclusion that the threat is serious? What other factors should we consider to place the magnitude of the challenge into the proper perspective?

What Is Terrorism?

According to Darrell M. Trent, associate director and senior research fellow, Hoover Institution, terrorism has "no shared definition."[2] Brian Jenkins of the Rand Corporation writes that terrorism is a "fad word used promiscuously. . . . What we have, in sum is the sloppy use of a word that is rather imprecisely defined to begin with."[3] Others have noted that it is a term "with various connotations and no singular meaning"[4] and that terrorism is "a term in common use [having] little common meaning."[5] The term *terrorism* is an emotive word with negative connotations: "Terrorism, like beauty, remains in the eye of the beholder."[6] According to psychologist H. H. A. Cooper, "terrorism is thus an easily recognized activity of bad character, subjectively determined and shaped by social and political considerations."[7]

Dutch political scientist Alex P. Schmid, in *Political Terrorism*, reviewed more than 140 definitions of terrorism written between 1936 and 1981. From these he identified 22 elements and 20 purposes or functions of terrorism. The five most frequently identified elements were: violence or force, political purpose, terror or fear, threat, and anticipated psychological effects or reactions by third parties.[8] The five most frequently identified purposes or functions were to: terrorize or put the public in fear, provoke indiscriminate repression or countermeasures by established authorities, mobilize the forces of terrorism or immobilize the forces of the established authorities, affect public opinion in a

positive or negative way, and seize political power or overthrow regimes.[9]

Although Schmid's study highlights the diversity of views on terrorism, it also offers some general impressions of what terrorism is about. But these impressions are only vague feelings: political violence, fear, innocent victims, third-party influence, and criminal and warlike activity. Lacking a common definition of terrorism creates problems of communication and understanding. Absent an agreed-on definition, statistics must be compiled on the basis of assumptions about terrorism. Without a universal definition or standard of what terrorism is, all data bases and statistical collections on terrorism are suspect. To appreciate fully the statistics offered, the assumptions underlying the collection of the data must be stated. Unless these assumptions are stated, comparison of data collected by various organizations, groups, and individuals is extremely difficult if not impossible. Not only are assumptions likely to differ from compiler to compiler, but in compiling their data bases groups may change their basic assumptions over time, making comparison of even their data toilsome, if not invalid. Both the Rand Corporation[10] and the Central Intelligence Agency (CIA)[11] data collection efforts illustrate the problem.

If a general definition would be so helpful, why then have nations and scholars been unable to agree on one? In part this lack of consensus may stem from "a struggle for legitimacy." "The edifice of legitimations," note sociologists P. L. Berger and T. Luckman, "is built upon language and uses of language as its principal instrumentality."[12] Language is not neutral, it is value laden. As Brian Jenkins aptly wrote, "Use of the term [terrorism] implies a moral judgment; and if one party can successfully attach the label *terrorism* to its opponent, then it has indirectly persuaded others to adopt its moral viewpoint."[13] As Australian criminologist Grant Wardlaw has noted, "This has led a number of writers to contend that the term 'terrorism' cannot be used as a behavioral description because it will always carry the flavour of some moral judgement."[14] Certainly the struggle for legitimacy, whether by those fighting terrorists or by those wishing to avoid being branded as such, must be recognized.

The issue is a matter of very real concern to all parties. Wrapped up in the law is status, recognition, standing, and equality. The more legitimacy a terrorist organization can obtain, the more it stands on a par with government; the more likely it is to garner support of money and men from others; and the better able it will be to pursue its goals. Yasir Arafat's welcome to the United Nations, for example, gave increased legitimacy to the Palestine Liberation Organization (PLO) and to its methods. Governments opposing terrorism are especially sensitive to this matter. They want domestic and international law applied to terrorists in a manner denying them any measure of legitimacy. In particular, they insist on characterizing every act of terrorists as criminal. Chapter 2 looks more closely at this issue and the possibilities available in law to governments for accomplishing their objectives.

Moreover, this lack of "universal agreement about who is a terrorist [exists because] political and strategic goals affect different states differently."[15] Religion and ideology also hamper efforts to reach an agreed-on definition. The third world approach to terrorism is influenced by their support for national liberation movements. The diverse political and strategic goals of Israel and the Arab states in a setting of religious struggle gives each of them a different perspective of what is terrorism. Similarly, the political and strategic goals of the United States and those of an ideologically motivated Soviet Union affect superpower assessment of the Nicaraguan contras, the Afghans on either side, and the PLO.

Even within the US government, officials do not have a uniform view of what constitutes terrorism. A 1985 Senate report concluded that "each agency or office of government has approached the problem of definition from its own point of view and responsibilities."[16] Wide differences abound as each federal agency has written its own definition. Walter Laqueur, chairman of the Research Council, Center for Strategic and International Studies, Georgetown University, noted that "the U.S. Government alone has provided half a dozen [definitions], which are by no means identical."[17]

Although the US government has produced numerous definitions of terrorism, the three most authoritative are:

1. Vice President's Task Force on Combatting Terrorism

> The unlawful use or threat of violence against persons or property to further political or social objectives. It is generally intended to intimidate or coerce a government, individuals or groups to modify their behavior or policies.[18]

2. Department of State

> Premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually intended to influence an audience.[19]

3. Department of Defense

> Unlawful use or threatened use of force or violence against individuals or property, with the intention of coercing or intimidating governments or societies, often for political or ideological purposes.[20]

Being the most authoritative does not mean that these definitions are official. As both the vice president's task force and the Department of State acknowledge, "while neither the United States nor the United Nations has adopted official definitions of terrorism, Americans readily recognize the bombing of an embassy, political hostage taking and most hijackings of an aircraft as terrorist acts."[21] Simply put, these are definitions drafted and used by US government agencies and groups but none are officially the accepted definition of the US government.

Each of the three definitions is flawed in some way; thus the unofficial status of each is fortunate. The major defect in the State Department definition is the omission of the modifier *unlawful* to describe the violence perpetrated by terrorists. It is inconceivable that terrorist violence could ever be other than illegal and criminal. The vice president's task force and Department of Defense (DOD) definitions have the same problem. Both believe it possible to terrorize property. It is difficult to imagine threatening property in the terrorist sense. Property is inanimate. Ultimately property put at risk must threaten a human being if it is to generate fear or terror—an essential element of terrorism. The DOD definition contains another, perhaps more serious, problem. It suggests by the use of the word *often* that terrorism might occur for other than political or ideological reasons. If terrorism can result from

acts motivated by personal reasons, then how can terrorist acts be distinguished from ordinary crimes?

Terrorism is a slippery subject and the foregoing comments indicate the complexity of the definitional problem. Perhaps the most that can be hoped for is a sense or feeling for what terrorism is. Secretary of State George P. Shultz may have best sensed it when he wrote, "Terrorism is, above all, a form of political violence."[22] For purposes of this study the following definition crafted from the three authoritative ones discussed above will be used as a general guide:

> Terrorism is the unlawful use or threatened use of force or violence against individuals to generate fear with the intent of coercing or intimidating governments, societies, or individuals for political, social, or ideological purposes.

Is a Legal Definition Necessary?

A generally accepted definition of terrorism does not exist in international law.[23] In the words of George Washington University law professor W. T. Mallison, Jr., "terror and terrorism are not words which refer to a well defined and clearly identified set of factual events. Neither do the words have any widely accepted meaning in legal doctrine. Terror and terrorism, consequently, do not refer to a unitary concept in law or fact."[24]

The first attempt at a definition in international law was in the 1937 Convention for the Prevention and Punishment of Terrorism. That convention defined "acts of terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public."[25] Other provisions of the convention severely restricted the acts recognized as crimes chiefly to those committed against public officials. The convention never entered into force and the definition, thought by many to be narrow and unrealistic, became a dead letter.[26] From that time until the present, no further definition of terrorism in international law has been formulated. A 1972 United States effort at a convention on terrorism, which included a legal definition, failed. The most

recent UN effort on terrorism, General Assembly Resolution 40/61, 9 December 1985, does not even attempt to define it.[27]

International lawyers are divided over whether the lack of an international law definition of terrorism is a serious problem.[28] But most agree with the late Judge Richard Baxter, Harvard University law professor and judge of the International Court of Justice (ICJ), that "we have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose."[29] If one looks at the long history of the UN effort to define aggression, a term that much like terrorism is emotional, value laden, and inextricably intertwined in politics, then one is led to acknowledge the wisdom of Judge Baxter.[30]

Why has a legal definition of terrorism been so difficult to achieve? The answer lies in the issue of legitimacy but viewed from a slightly different perspective. States wish to reserve to themselves the political and legal determination of what terrorism is. They do not want to be bound by an abstract definition that could create serious political problems in a particular situation.[31] Also, some states see efforts directed at terrorism as opposition to self-determination. Others see measures aimed at controlling terrorism as disguised measures aimed at their cause. Still others see the need to address the underlying causes of terrorism before terrorism itself can be addressed.[32]

If a general definition of terrorism is not possible, then what approach should we take? First, a new term could be devised, one containing the essence of terrorism without its negative emotive aspects. Such a new term would not be so easy to conjure up. However, such an approach has a precedent. The evolution of the term *quarantine* in the Cuban missile crisis is an example, but the creation of this new term was not without criticism.[33]

Second, terrorism could be viewed as merely one aspect of a much larger human rights issue. This view was reflected in the thinking of the Carter administration.[34] This approach is rooted in the observation of University of Houston law professor Jordan Paust that "human rights expectations seem to prohibit all forms

of violent terrorism per se."[35] However, treating terrorism as a human rights question is a two-edged sword.

A persuasive argument can be made that human rights and terrorism are fundamentally incompatible and that terrorism must yield to the higher community value of human rights. Therefore, terrorism is unlawful activity. But, if terrorism is a human rights issue, then like other human rights issues terrorism should be judged by the purpose or cause which it is intended to serve. Suggesting that the terrorist cause might be germane to judging the lawfulness of terrorist acts is anathema to the West. In the words of Secretary Shultz, "the grievances that terrorists supposedly seek to redress through acts of violence may or may not be legitimate. The terrorist acts themselves, however, can never be legitimate. And legitimate causes can never justify or excuse terrorism. Terrorist means discredit their ends."[36]

A third approach is to focus on the acts of terrorists and seek to criminalize those acts through international agreement rather than attempting to define terrorism. The Committee on Terrorism of the International Law Association has taken this tack.[37] The United States—by supporting those bilateral and multilateral conventions that prohibit certain acts such as hijacking and those agreements that protect diplomats—has furthered this approach.[38] But this approach has serious limitations not the least of which are loose language, unenforceability, and nonratification by states whose conduct supports terrorists. Each of these three approaches merits further study.

This study focuses on a fourth approach: the use or threatened use of military force abroad. When certain factual circumstances exist, a nation is justified under international law in resorting to the use or threatened use of military force. This principle applies even in the absence of an accepted international law definition of terrorism. Put another way: What legal preconditions justify the force option? Subsequent chapters will consider those factual circumstances.

We can strive to develop definitions for particular documents as required, but we should not be consumed in the task of attempting to write a general all-encompassing legal definition to fully describe such a complex subject. Definitions are merely tools

which, in and of themselves, are more or less useful. As long as we have a sense of the social phenomenon of terrorism, a general legal definition may be unnecessary. And although a general international law definition does not exist, we can proceed without one. Other terminology used in this study, however, requires clarification, not in the legal but in the factual sense.

International Terrorism: A Working Definition

The Department of State defines international terrorism as "terrorism involving citizens or territory of more than one country."[39] For purposes of this study, however, the more detailed definition proposed by Brian Jenkins is adopted. He defines international terrorism as

> incidents in which terrorists go abroad to strike their targets, select victims or targets because of their connection to a foreign state (diplomats, executives or foreign corporations), attack airliners on international flights, or force airliners to fly to another country. It excludes the considerable amount of terrorist violence carried out by terrorists operating within their own country against their own nationals, and in many countries by governments against their own citizens.[40]

As Jenkins notes, "International terrorism in this sense is violence against the 'system', waged outside the 'system'."[41] It is terroristic violence "across international borders"[42] having "international repercussions; or acts of violence which are outside the accepted norms of international diplomacy and rules of war."[43] Precisely this type of terrorism—that is, terrorism projected across national frontiers—is the concern of international law. International terrorism *is* an international law issue.[44]

Hence, state sponsorship or support is not a precondition for international terrorism, as the term is used in this study. The CIA[45] and some scholars[46] distinguish international terrorism from transnational terrorism[47] based on whether the terrorist act is state sponsored. In CIA rhetoric, state-sponsored international terrorism would be a redundancy. Not so here. This study does not adopt the CIA approach because of the need to consider the nature and

degree of state involvement in international terrorism as a separate issue from whether terrorists operate across national boundaries. The latter condition, per se, violates international law, while the level and kind of state involvement are factors that determine the legal remedies open to the harmed state, as we shall see in the discussion of state responsibility in chapter 3.[48]

Levels of State Involvement

As noted by Prof John H. Murphy, Villanova University, "the whole issue of state support of international terrorism, however, is badly in need of typology; there are different kinds of state support."[49] Four levels of state involvement, from greatest to least, are: sponsorship, support, toleration, and inaction through inability to act. Because these levels have not been understood nor carefully delineated in the general literature, some confusion prevails.

State Sponsorship

State sponsorship exists when a state directly uses international terrorism "as another weapon of warfare to gain strategic advantage where they cannot use conventional means."[50] According to the CIA, 1980 was "the first year [since World War II] that a large number of deadly terrorist attacks were carried out by national governments."[51] State-sponsored terrorism, to turn a phrase of Gen Carl von Clausewitz, "is a continuation of war by other means." A 1985 Senate report agreed that terrorism "can be another tool for nations to project military and political power. Terrorism [becomes] an instrument that can be brought into action whenever a state wishes to project its power into the territory of another without accepting the responsibility, accountability, and risks of avowed belligerency."[52] States identified by the United States government as having sponsored international terrorism at one time or another include Libya, Iraq, Syria, and South Yemen.[53]

State Support

State support of international terrorism exists when a state uses its resources to provide assistance in the form of training, arms, explosives, equipment, intelligence, safe havens, communications, travel documents, financing, or other logistic support but does not direct terrorist incidents.[54] States give support when they provide capability without assuming control or direction. Current evidence suggests that the Soviet Union and Soviet-bloc countries—including Bulgaria, Cuba, Czechoslovakia, and East Germany—are actively providing this type of state support.[55]

State Toleration

State toleration exists when states, although aware of terrorist groups within their borders, do not support them but do not act to suppress them either. Such terrorists groups may be self-supporting or may have foreign sponsors or supporters. They may carry out their terrorist activities primarily abroad having reached an unspoken understanding with the host government. Allegations that some Western European nations have tolerated international terrorists within their borders have surfaced from time to time—the *Euzkadi ta Azkatasuna* (Basque National Liberty movement) in southwestern France, for example).

State Inaction

In this particular circumstance, the state does not wish to ignore international terrorists within its borders but lacks the ability (either through inadequate domestic police and military forces or lack of technology) to respond effectively. In such a situation, as we shall see in chapter 3, the state's responsibility to deal with these terrorists continues. It may meet this responsibility by inviting another state or regional organization to assist it. The aerial hijacking to Mogadishu in 1977 is an example. The Somalian government, unable to act, asked for assistance from the West German government. If a state is incapable of responding to international terrorism and does not request outside help, then a situation may arise in which assistance may be given without an

invitation. The Entebbe hostage rescue is sometimes cited as an example, although there is evidence that President Idi Amin of Uganda may have participated in the hijacking scheme and was not simply unable to act, as many previously have believed.

Terrorism in Perspective

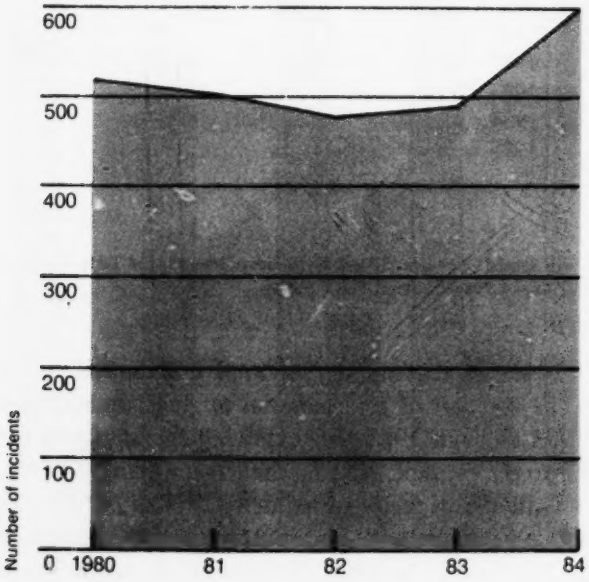
Scholars agree that terrorism is an ancient trade, a form of political activity as old as history. The Romans had to deal with the terrorism of the sicarii, a sect of Jewish zealots, active in ancient Judea (A.D. 66–73). Hassan Ben Sabbah, born in A.D. 1007, was the leader of a sect that reputedly drugged its victims with hashish prior to killing them. The word *assassin* derives from this sect's method of murder. In the period of the Jacobins, 1793–94, France had its Reign of Terror. It is from these times that the word *terror* was added to our vocabulary. The activities of nineteenth- and twentieth-century anarchist and terror groups are well known. Infamous are the People's Will (*Narodnaya Volya*) and their assassination of Russian tsar Alexander II in 1881; the Israeli Stern gang of the 1930s and 1940s; and factions of the Palestine Liberation Organization.[56]

Over the years, several political thinkers have written about this phenomenon. Friedrich Nietzsche wrote, "We are terrified by the idea of being terrified."[57] Niccolò Machiavelli advised in *The Prince* that "in actions of man, and especially princes, from which there is no appeal, the end justifies the means. Let a prince therefore aim at conquering and maintaining the state and the means will always be judged honorable and praised by everyone."[58] Mikhail Bakunin, the Russian anarchist, called terrorism "the propaganda of the dead."[59]

The historical examples cited thus far have been of domestic terrorism. It would be an error to conclude, as some do, that domestic terrorism is old but international terrorism is new, having its origins in the midtwentieth century. We can find many prominent examples of international terrorism. On 14 January 1858 Felice Orsini, an Italian, attempted to assassinate Emperor Napoléon III and Empress Eugenie of France. On 28 June 1914 a Serbian, Gavrilo Princip, a member of Young Bosnia (*Mlada*

Bosna), assassinated Archduke Francis Ferdinand of Austria and his wife at Sarajevo, Yugoslavia. This act played a vital role in igniting World War I. As Paul Wilkinson of the University of Aberdeen notes, after the First World War international terrorists were endemic in the new Balkan States.[60]

Although surveys of history show that terrorism has been a problem for earlier ages the statistics available today seem to indicate that terrorism now may be far more widespread and acceptable as a form of political action than at any time in the past. Keeping in mind the problems and assumptions underlying data collection, as previously noted, what general impressions can statistics provide us about the threat? Department of State* statistics (fig. 1)



Source: US Department of State, "International Terrorism," *Selected Documents* 24 (1986), 3.

Figure 1. International Terrorist Incidents, 1980–84.

*The Department of State is the lead agency in the US government on international terrorism.

for the five years 1980–84 indicate that international terrorist incidents are on the rise.

The Vice President's Task Force on Combatting Terrorism found the number of incidents rising to 812 in 1985.[61] This trend probably will continue upward in the years to come.[62] Approximately 25 percent of all incidents were directed against Americans; of these, the number directed against Defense Department personnel and facilities is shown in table 1.

TABLE 1

International Terrorist Incidents Involving DOD Personnel, 1980–84

Year	*Number of Incidents*
1980	43
1981	56
1982	67
1983	56
1984	60
1985	47

Source: USAF Special Operations School, Dynamics of International Terrorism Course, Class 86J, August 1986, Hurlburt Field, Florida.

Figure 2 shows the number of total US casualties killed or wounded as a result of international terrorist incidents for the period 1981 through 1985. In reviewing the statistics from the late 1960s to the present, we find that fewer than 500 Americans have been killed as a result of incidents.[63] The 241 Marines and other service members who died in Beirut in 1983 comprise more than half this figure. In 1984, 31 Americans were injured and 11 killed; 160 Americans were injured and 233 killed in 812 terrorist incidents in 1985. Compared to the 45,000 American highway fatalities and the 18,000 American homicides in 1985, this threat does not seem significant.[64] The threat seems even less serious when we are told by the Federal Bureau of Investigation

(FBI) that for the past two and one-half years no international terrorist incidents have occurred in the United States.[65]

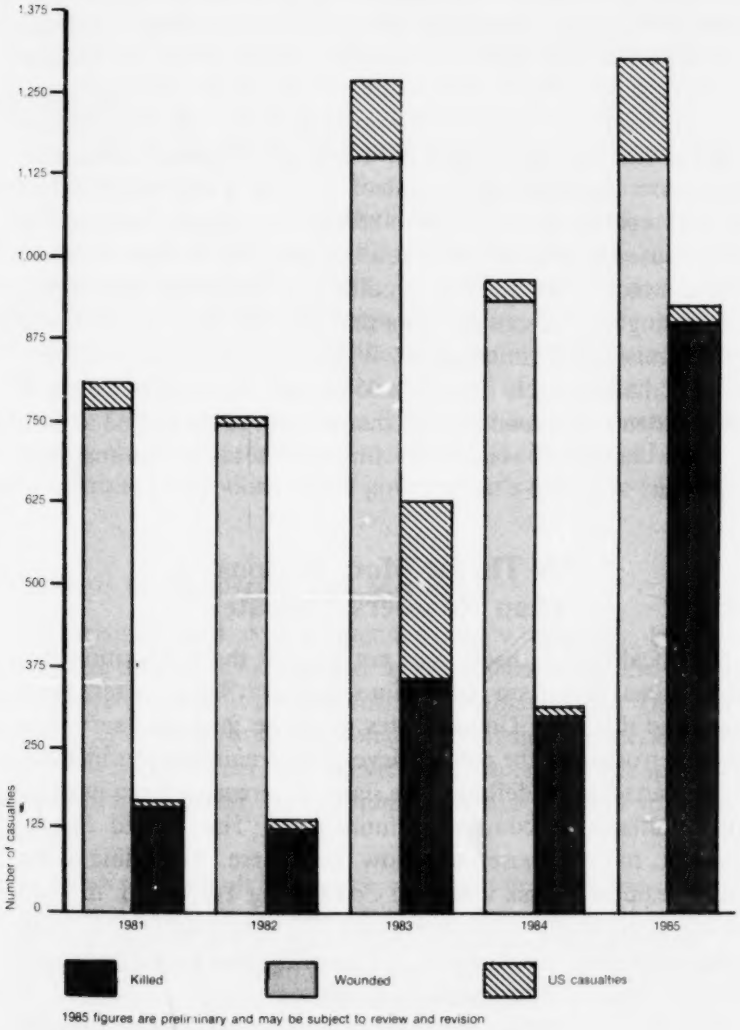


Figure 2. Casualties from International Terrorist Attacks, 1981–85.

In pure numbers the international terrorist threat appears to be overstated. "The actual amount of violence caused by international terrorism," admits Brian Jenkins, "has been greatly exaggerated. Compared with the world volume of violence or national crime rates, the toll has been small."[66] He also notes, "Indeed, compared with the volume of ordinary violent crime, the amount of terrorist violence is minuscule."[67] In yet another analysis, Jenkins observes, "Without devaluating human life it might also be pointed out that terrorism at least at its current level is a bearable price. A comparison of the toll of terrorism versus the toll of ordinary crimes should serve to reduce an exaggerated sense of alarm caused by a relatively few, albeit dramatic deaths."[68] Much time and money are devoted to collecting, collating, publishing, distributing, and discussing data that provides only limited, and perhaps misleading, information. Whatever the reason for our passion for mathematics, figures, and charts, we must be able and willing to move beyond our fascination with statistics and to look to other factors if we are to find truths about international terrorism.

A Threat More Serious Than Numbers Indicate?

Statistical data in itself does not support the proposition that international terrorism is a serious threat.[69] Some writers have suggested that "the United States might be far better served to ignore terrorism on the political level, both minimizing its inability to deter attacks and deflating the status of terrorists from international outlaws to common criminals."[70] The United States, however, has not chosen to follow this course. According to the Vice President's Task Force on Combatting Terrorism, in 1985 the US government spent more than $2 billion and 18,000 work years addressing this problem.[71] This effort also consumed much valuable time of many senior US officials.

Why does combating international terrorism rank so high on the national agenda? Can it be as serious an issue as war, national debt, overpopulation, starvation, trade balance, and disease? And

why was Secretary Shultz moved to say on 4 February 1985: "Terrorism poses a *direct threat* not only to Western *strategic interests* but to the very moral principles that undergird Western democratic society [emphasis supplied]?"[72] Several factors make international terrorism a threat beyond what mere numbers suggest.

Perception

The strength in terrorism is not in action but in reaction. The effect is greater than the event. Popular "perceptions of terrorism are determined not by statistics but rather by spectacular acts."[73] By achieving disproportionately large effects, terrorists are able to cause worldwide alarm and force governments to deal with them. These perceptions, although not reality, become reality.[74] Confidence in government is shaken. According to Robert Grant, a terrorism expert with the Atlantic Council of the United States, terrorism "creates the enormous frustration for a government of not being able to provide for the security of its citizens, and undermines public perceptions of the government's ability to rule."[75]

Antithesis of Democracy and Morality

Terrorism is contrary to all that democracy stands for. It seeks to displace the rule of the majority by the dictates of the few. Some authorities consider it another form of totalitarianism. The vast majority of terrorist acts have been directed against democracies.[76] Seldom is a totalitarian state the victim; frequently it is a sponsor or supporter. Darrell Trent summarizes this concern in these words:

> Terrorists seek reversals in the system of authority that is the framework of civilized people—by demanding release for those who have been imprisoned according to due process of law, by attempting to dictate policy without regard to the structure of democracy, by aspiring to reorder society or determine its direction without consideration of, or in spite of, majority consensus.[77]

In sum, "terrorism is an affront to civilization."[78]

Declining US Credibility

International terrorism is an international problem. The world community looks to the United States as a community leader to provide direction. However, the United States has failed in many of its visible counterterrorist efforts, a fact that has created doubt about US competence. "The U.S. experience in the Iranian desert was depicted," concluded the Georgetown University Center for Strategic and International Studies, "not simply as a difficult attempt that failed, but as a debacle, a symbol of U.S. military impotence and presidential bungling."[79] Robert McFarlane, then assistant to the president for national security affairs, remarked in 1985 that "a cumulative effect of this pattern of low level violence is a slow attrition of our national security brought on by the slow erosion of our reliability, of our apparent ability to solve problems, a declining confidence among our friends and allies."[80]

Multiplier Effect of Terrorist Attacks

International terrorist incidents can trigger bigger events. The assassination of the heir to the throne of the Austro-Hungarian Empire in 1914, which led to World War I, is a frequently cited example. Although recent terrorist events have not had such cataclysmic effects (some worry about miscalculated state sponsorship or Soviet support of international terrorism escalating into World War III), significant effects have occurred. Adm James D. Watkins, former chief of naval operations, found that more than 30 armed conflicts in progress in 1984 were spawned by some form of terrorism.[81]

Consider the impact on governments and on North-South and East-West relations of the assassination of Anwar Sadat of Egypt, Indira Gandhi of India, and Bashir Gemayel of Lebanon.[82] What would have been the impact if the attempted assassination of Prime Minister Margaret Thatcher in Brighton had been successful? On 13 May 1981 a Turkish terrorist attempted to assassinate Pope John Paul II in St. Peter's Square, Rome. What effect would that have had on Soviet influence in Poland and on Solidarity?[83] On

9 October 1983 North Korean agents set off an explosion at the Aung San or Martyrs' Mausoleum in Rangoon, Burma, hoping to murder President Chun Doo Hwan and the entire South Korean cabinet. Seventeen officials died, including the deputy prime minister and three senior cabinet officials. President Chun escaped. The purpose of the terrorist attack was to cause the collapse of the Seoul government.[84]

International terrorism has had a considerable impact on the US government. In 1979 the US Embassy in Tehran, Iran, was seized, and for 444 days the nation was held hostage. Following the 1983 and 1984 bombings of the US Embassy annex and US Marine Corps headquarters in Lebanon, the United States withdrew its forces from the area, an action that reduced Western leverage there and allowed control of Lebanon to shift to more radical elements.[85] At the end of 1986, the Reagan administration revealed that it had sold military arms to Iran (while pressuring other nations not to do so) in what amounted to an exchange of arms for the release of American hostages held in Lebanon.[86] Uncertainty has arisen over the administration's policy on hostage taking and negotiating with terrorists.[87] Foreign governments are upset; senior administration officials are at odds with one another; and some top officials have resigned or been dismissed.

Diplomatic relations between countries are often adversely affected by terrorist and counterterrorist actions. The United States severed relations with Iran and Libya over terrorism. In 1980 Guatemalan police stormed the Spanish Embassy. During the attack a fire broke out, the embassy (which was occupied by armed militants) was burned and 39 persons died, including 32 of the 33 hostages. Only the Spanish ambassador survived. Outraged, Spain broke relations with Guatemala.[88] The shooting in April 1984 of a London policewoman at St. James Square in front of the Libyan People's Bureau led to Great Britain's breaking of diplomatic relations with Libya.[89] The involvement of Syria in the attempted El Al bombing on 17 April 1986 by Nezar Hindawi led to Britain's severing of diplomatic relations with Syria.[90] United States-Italian relations were not helped as the forces of each faced one another on the tarmac in Sardinia after the United

States militarily diverted the Egyptian airliner carrying the *Achille Lauro* terrorists. Neither were US-Egyptian relations.

Hijackings and terrorist incidents make foreign travel less desirable. Experts have estimated that in 1986 American tourism to Europe was down more than 50 percent due to terrorism. Terrorism indirectly caused one of the worst international aviation accidents, when on 27 March 1977, two 747 jets collided at Tenerife Airport, Canary Islands. The two aircraft had been diverted from Las Palmas because a terrorist bomb had exploded in a flower shop there.[91]

Brian Jenkins authored a scenario on how terrorism might be used to influence events far beyond the immediate incident.

> Suppose a target nation has part of its strategic forces deployed overseas, including missile sites in another country. Perhaps there already has been some local opposition to the presence of these weapons. And perhaps also there are one or two extremist groups which have carried out relatively minor acts of violence. The groups have some international links but they lack the resources for any major undertaking. It is conceivable that through their links with a foreign power local terrorists could be provided with the intelligence and some equipment necessary to launch an attack on one of the sites. Shortly before a bilateral treaty allowing the use of the sites is to be renewed, the terrorists attack, but, of course, fail. They penetrate the perimeter, but little damage is done to the missiles. Local newspapers, however, receive an anonymous tip that some lethal radioactive material has been released as a result of the attack. Indeed, checks with primitive Geiger counters show some presence of radioactivity. The country whose missiles they are claims that no radioactive material escaped, and that probably the terrorists themselves deliberately spread a small quantity of radioactive waste material to alarm the population; there is said to be no danger; the denial is not convincing. Meanwhile, the terrorists warn of further attacks. Demonstrations against renewal of the arrangement by which the weapons are there in the first place begin and grow. . . . The local government is shaken by the episode. There are further terrorist incidents. Relations between the two countries are strained. The owner of the missiles is finally asked to remove them.[92]

Does this scenario seem farfetched? Hardly. One need only recall the demonstrations in Europe against the deployment of the cruise missile. And consider the following: "Unknown individuals disseminated radioactive materials normally used in medicine

aboard an Austrian train in April 1974, causing much concern if not substantial property damage and casualties among railroad passengers."[93]

Terrorism disrupts international relations. It plays states and societies against one another. "The delivery truck," notes a 1985 Senate report, "may turn out to be the most destructive weapon of this era, not the SS-18 or the SS-20 ballistic missile."[94]

"New Aspects"

As discussed, international terrorism is not new. But developments of the past decade have given it a new and more threatening character. One new aspect is networking, that is, the rendering of assistance between terrorist organizations.[95] Another new and more dangerous aspect is state sponsorship and support.[96]

Access to the armories, training facilities, intelligence service, funds, safe havens, and other sources of expertise of sympathetic states vastly improves the firepower, effectiveness, and sophistication of terrorist groups.[97] States sponsor and support terrorism because it is cheap and the risk, low. "Modern conventional war," writes Brian Jenkins, "is becoming increasingly impractical. It is too destructive. It is too expensive."[98] Terrorism is a force multiplier.

> For the weaker states the high leverage/low cost factors provide them with an impact they could never hope to achieve in a conventional arena. For the Soviet Union, the high leverage/low risk function is attractive because it is able to achieve certain strategic objectives—disunity within the NATO alliance, for example—without increasing the risk of conventional or nuclear engagement. The United States has been hard put to devise a policy that would alter the risk-benefit calculus for these sponsors of international terrorism.[99]

In 1969 Andrew Scott articulated the concept of informal penetration in his study *The Revolution in Statecraft*.[100] He saw, in addition to formal techniques of foreign policy, a growing complexity of informal operations carried on by persons other than diplomats and soldiers (nonactors). These nonactors received state support through large organizations, massive budgets, extensive training programs, and all paraphernalia of institutionalization.

He was uncertain whether this trend was good or bad, acknowledging that "the full implications of informal penetration for international stability will probably not be clear for some time to come."[101] Scott thought this trend created both problems and potentialities and withheld judgment. Today the implications are clearer. Sponsors and supporters of international terrorists have no compunction about their methods while democratic states are constrained in the manner in which they can effectively meet the challenge.[102]

And what has the challenge become? State-sponsored or -supported international terrorism has been called "a new form of warfare,"[103] a "tool of low-intensity warfare,"[104] "protracted political warfare . . . a form of 'indirect aggression',"[105] and "surrogate warfare."[106] Jacques Bergier in his book *World War III Has Begun* sees World War II as the last conventional war, World War III as a terrorist war having begun with the West already losing.[107] Is terrorism properly to be equated with war and warfare? Most commentators use these terms in the generic sense much as they would refer to the war on poverty or the war against disease or unemployment. Whether, in legal terminology, terrorist conduct constitutes war or warfare is an entirely different issue that we explore in chapter 2. What is certain, however, is that more and more states are sponsoring and supporting international terrorism. This trend likely will continue because of the low cost and risk to the sponsoring or supporting state.[108] Many believe that an effective way to meet this challenge is not only to deal with the international terrorists themselves but to weaken the link between them and their sponsors and supporters.[109]

Summary and Transition

International state-sponsored and -supported terrorism is a serious threat to the United States.[110] The US government considers it a national security challenge.[111] The Joint Chiefs of Staff (JCS) evaluated this threat in the *U.S. Military Force Posture FY-1986* in these words:

> The use of terrorism against the United States . . . continues to pose a formidable challenge. . . . The threat from international terrorism has

> never been greater. . . . In addition to the renewed activity of terrorists indigenous to countries of Western Europe, the threat is growing from Muslim transnational groups which originate in the Middle East and are influenced by Iran, Libya and Syria. These groups pose a significant threat to U.S. interests both in the Middle East and in Europe.[112]

What factual circumstances, evidence, and preconditions must exist in a particular situation to justify the lawful use of military force as an option is yet to be addressed. This chapter has provided an insight into basic definitions and with a historical and statistical overview of the threat and has examined other perspectives that help explain the seriousness of terrorist activities. If the reader understands that state-sponsored and -supported international terrorism is a serious challenge to international order and to American security interests, then a basis exists for an understanding of why the use of military force may be necessary in particular situations. If the threat is not appreciated, then neither will be the remedy.[113]

NOTES

1. The goal is to "manage" terrorism. It cannot be eliminated for, as Ernest Evans writes, "in a world marked by ideological rivalries, ethnic clashes, and extremes of wealth and poverty, it is utopian to hope for an end to politically motivated violence." Evans, "Toward a More Effective U.S. Policy on Terrorism," in *Political Terrorism and Energy: The Threat and Response*, ed. Yonah Alexander and Charles K. Ebinger (New York: Praeger, 1982), 250. Alsq, as Brian Jenkins notes, "a certain amount of political violence is a price paid for a free and open society." Brian Michael Jenkins, "Fighting Terrorism: An Enduring Task," Rand, 6585, Rand Corp., Santa Monica, Calif., February 1981, 4.

2. Darrell M. Trent, "Terrorism: Threat and Reality," *Vital Speeches* 46, no. 3 (15 November 1979): 79.

3. Brian Jenkins, *International Terrorism: A New Mode of Conflict* (Los Angeles: Crescent Publications, 1975), 2, California Seminar on Arms Control and Foreign Policy, research paper 48.

4. Charles W. Stecker, "Political Terrorism: National and International Responses since 1972" (master's thesis, University of Nebraska, December 1982), 4.

5. Maj William R. Farrell, USAF, "Terrorism Is . . . ?" *Naval War College Review* 32, no. 3 (May–June 1980): 64.

6. Ibid., 68.

7. H. H. A. Cooper quoted in ibid., 64.

8. The 22 elements identified were: (1) violence, force; (2) political; (3) fear, terror emphasized; (4) threat; (5) (psychological) effects and (anticipated) reactions; (6) victim-threat differentiation; (7) purposive, planned, systematic, organized action; (8) method of combat, strategy, tactic; (9) extranormality, in breach of accepted rules, without humanitarian constraints; (10) coercion, extortion, induction of compliance; (11) publicity aspect; (12) arbitrariness, impersonal, random character, indiscriminateness; (13) civilians, noncombatants, nonresisting neutrals, outsiders as victims; (14) intimidation; (15) innocence of victims emphasized; (16) group, movement, organization as perpetrator; (17) symbolic aspect, demonstration to others; (18) incalculability, unpredictability, unexpectedness of occurrence of violence; (19) clandestine, covert nature; (20) repetitiveness, serial or campaign character of violence; (21) criminal; and (22) demands made on third parties. Alex P. Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases and Literature* (Amsterdam: North-Holland Publishing Co., 1983), 76–77.

9. The 20 purposes or functions were: (1) to terrorize, to put the public or sections of the public in fear; (2) to provoke (indiscriminate) countermeasures by the incumbents, deliberately provoking repression, reprisals, and counterterrorism; (3) to mobilize forces; (4) to affect public opinion in a positive or negative way, to cause a polarization and radicalization among the public or sections thereof; (5) to seize political power, to overthrow regimes; (6) to break down, eradicate resistance; (7) to obtain money to finance arms purchases and operations; (8) to maintain power, to discipline, to control, to dissuade target groups, to enforce obedience, allegiance, conformity; (9) disorientation, psychological isolation of the individual from his social context; demoralization of society, causing disorder; create alarm; create an atmosphere of anxiety, insecurity; create a climate of panic, collapse; (10) extermination, to damage, injure, or eliminate government property or personnel, elimination of opposing and rivaling forces, either physically or by neutralizing their effectiveness; (11) to disrupt and discredit the processes of government, to erode democratic institutions, to destroy public confidence in government, to disrupt normal operations of society, to demonstrate the vulnerability of the government and shatter the image of strength surrounding it; (12) to project an image of strength and determination (abroad); (13) advertising the movement or cause, to gain publicity, to attract attention, to awaken public opinion, to force audiences to take grievances seriously and to redress them, to gain recognition, to acquire popular support; (14) to immobilize security apparatus, to immobilize forces; (15) to win recruits for the terrorist movement; (16) morale-building within the terrorist movement itself and with their sympathizers; (17) to maintain discipline within the terrorist organization, to punish

errant members and traitors; (18) winning of specific concessions through coercive bargaining (release of prisoners, publication of manifesto, etc.), extortion; (19) punishment for cooperation with the enemy or for engaging in harmful activities or for other guilts; and (20) to impose domination, to subdue and paralyze, to subjugate, intimidate. Ibid., 97–99.

10. Concerning the factors and assumptions underlying the Rand Corporation's statistics on terrorism, see Brian Michael Jenkins, "The Study of Terrorism: Definitional Problems," Rand, 6563, Rand Corp., Santa Monica, Calif., November 1980, 5–6.

11. Concerning CIA statistics, Grant Wardlaw writes, with evident frustration:

> A recent report by the United States Central Intelligence Agency (CIA) illustrates that even compilations of statistics of international terrorism are fraught with danger. . . . The 1980 report was interesting in that it completely revised many of the figures published in previous years. "The agency said that its previous data had been too dependent on 'U.S. sources' and that it is now satisfied that its records are 'complete and current'." . . . The fact that an agency with the resources of the CIA can conclude at a particular point in time that many of its previously published statistics were underestimates makes it difficult to have confidence in the accuracy of their figures.

Wardlaw, *Political Terrorism: Theory, Tactics, and Counter-Measures* (Cambridge, England: Cambridge University Press, 1982), 50–51. See also John F. Murphy, *Punishing International Terrorists: The Legal Framework for Policy Initiatives* (Totowa, N.J.: Rowman & Allanheld, 1985), 119; and Schmid, 267–78.

12. P. L. Berger and T. Luckman, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Garden City, N.J.: Doubleday and Co., 1966), 64.

13. Jenkins, "Study of Terrorism," 1. One panel at the 1981 National Security Affairs Conference saw obstacles to defining terrorism "not the least of which were ideological values and bureaucratic politics that distorts analysis, and cross-national differences that make it difficult to generalize about terrorist profiles and the effectiveness of terrorism." Panel 5 summary, "Global Terrorism: What Should the U.S. Do?" in "The 1980s: Decade of Confrontation?" *Proceedings of the Eighth Annual National Security Affairs Conference*, 13–15 June 1981 (Ft. Lesley J. McNair, Washington, D.C.: National Defense University, 1981), 237.

14. Wardlaw, 5.

15. Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Report on "State-Sponsored Terrorism,"* 99th Cong., 1st sess., June 1985, Senate print 99-56, 7.

16. Ibid., 25.

17. Walter Laqueur, "Reflections on Terrorism," *Foreign Affairs* 65, no. 1 (Fall 1986): 88.

18. Vice President, *Public Report of the Vice President's Task Force on Combatting Terrorism* (Washington, D.C.: February 1986), 1.

19. Department of State, "Patterns of Global Terrorism: 1984," Washington, D.C.: November 1985, inside front cover.

20. DOD Directive 2000.12, *Protection of DOD Personnel and Resources against Terrorist Acts*, 16 June 1986, para. C.1. This definition is a change from the 12 February 1982 version of DODD 2000.12, which provided that the unlawful use or threatened use of force or violence was "by a revolutionary organization." An Air Force definition can be found in AFR 208-1, *The US Air Force Antiterrorism Program*, October 1982, para. a. This is a limited definition, however, intended for use within the context of the US Air Force antilogarithms program.

21. Vice President, *Report on Terrorism*, 1. See also State Dept., "Global Terrorism," inside front cover.

22. George P. Shultz, "Terrorism in the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 432.

23. Domestic law of the United States has not addressed the definitional issue either, and no federal common law exists. A few federal statutes contain definitions, but those definitions were drafted for the specific purpose of each law. For example, *US Code*, Title 18, sec. 1203, makes criminal the taking of US citizens as hostages worldwide, while sec. 3077 authorizes the attorney general to pay rewards for suppression of terrorism. Sixteen states have statutes dealing with terrorism or terrorist threats: Arkansas, California, Delaware, Georgia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, New Hampshire, North Dakota, Pennsylvania, Tennessee, Texas, and Utah.

24. W. T. Mallison, Jr., and S. V. Mallison, "The Concept of Public Purpose Terror in International Law: Doctrine and Sanctions to Reduce the Destruction of Human and Material Values," *Howard Law Journal* 18 (1974): 1. In a similar vein, Francis A. Boyle has written that "'terrorism' is a vacuous and amorphous concept entirely devoid of an accepted international law meaning." Boyle, "Upholding International Law in the Middle East," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 519. Christopher C. Joyner, George Washington University, agrees that terrorism's "exact status under international law remains open to conjecture and polemical interpretation." Joyner, "Offshore Maritime Terrorism: International Implications and Legal Response," *Naval War College Review* 36, no. 4 (July–August 1983): 20. See also Paul Wilkinson, *Terrorism and the Liberal State* (New York: John Wiley and Sons, Halsted Press, 1977), 52.

25. See Convention for the Prevention and Punishment of Terrorism, opened for signature at Geneva, 16 November 1937, League of Nations, C.94.M.47.1938.V.

26. See Hans-Peter Glasser, "Prohibition of Terrorist Acts in International Humanitarian Law," *International Review of the Red Cross*, no. 253

(July–August 1986): 201; and Jordan J. Paust, "'Nonprotected' Persons or Things," in *Legal Aspects of International Terrorism*, ed. Alona E. Evans and John F. Murphy (Lexington, Mass.: Lexington Books for American Society of International Law, 1978), 351.

27. UN General Assembly, resolution on international terrorism, 9 December 1985, Resolution 61, UN GAOR, 40th sess., supp. 53, A/40/53 (1986), reprinted in Official Documents, *American Journal of International Law* 80, no. 2 (April 1986): 435–37. See also George R. Constantinople, who writes, "The resolution condemns terrorism, but it is disappointing in its force since it does not define terrorism and takes no substantive measures to act against terrorism on the international level. The denunciation of terrorism is carefully balanced by the reaffirmation of the 'inalienable right to self-determination'." Constantinople, "Toward a New Definition of Piracy: The *Achille Lauro* Incident," *Virginia Journal of International Law* 26, no. 3 (1986): 724, n. 1. The vice president's task force on terrorism misread the value of this resolution by calling it the "first unequivocal resolution condemning terrorism." Vice President, *Report on Terrorism*, 12.

28. Jordan Paust, University of Houston Law School, takes the view that a "precise, realistic definition at the international level is necessary for common opposition to *impermissible* terrorism [emphasis added]." See Paust, 351. See also Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 67; and Wardlaw, 103.

29. Richard R. Baxter, "A Skeptical Look at the Concept of Terrorism," *Akron Law Review* 7 (1974): 380.

30. See UN General Assembly, "Definition of Aggression," Resolution 3314, UN GAOR, 29th sess., supp. 31, A/9631 (1974), 142. See also Jack I. Garvey, "The U.N. Definition of 'Aggression': Law and Illusion in the Context of Collective Security," *Virginia Journal of International Law* 17, no. 2 (Winter 1977): 199.

31. See Senate, *State-Sponsored Terrorism*, 29.

32. See Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin's Press, 1985), 99, n. 6.

33. See Carl Q. Christol and Comdr Charles R. Davis, USN, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962," *American Journal of International Law* 57, no. 3 (July 1963): 525–45; Leonard C. Meeker, "Defensive Quarantine and the Law," *American Journal of International Law* 57, no. 3 (July 1963): 515–24; and Quincy Wright, "The Cuban Quarantine," *American Journal of International Law* 57, no. 3 (July 1963): 546–65.

34. See *Combatting Terrorism: A Matter of Leverage*, ed. Edward Marks and Dèbra van Ostpal (Washington, D.C.: Georgetown University Center for Strategic and International Studies, June 1986), 49–50.

35. Jordan J. Paust quoted in Richard B. Lillich and John M. Paxman, "State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities," *American University Law Review* 26, no. 2 (Winter 1977): 308. See also Paust, 354–57; and Robert A. Friedlander, *Terror-Violence: Aspects of Social Control* (New York: Oceana Publications, 1983), 93.

36. Shultz, "Terrorism in the Modern World," 437. See also Friedlander, 77; Gayle Rivers, *The War against Terrorists: How to Win It* (New York: Stein and Day, 1986), 103; Paul Wilkinson, book review essay, "Can a State Be a 'Terrorist'?" *Journal of International Affairs* 57, no. 3 (Summer 1981): 468; and S. J. Sorabjee quoted in International Law Association (ILA), "International Terrorism," in *Report of the Fifty-Seventh Conference Held at Madrid* (Great Britain: 1978), 134.

37. See "Introduction," n. 8.

38. See Yoram Dinstein, "Comments on the Fourth Interim Report of the ILA Committee on International Terrorism (1982)," *Terrorism: An International Journal* 7, no. 2 (1984): 66; Christopher Dobson and Ronald Payne, *Counterattack: The West's Battle against Terrorists* (New York: Facts on File, 1982), 184; John R. Stevenson, "International Law and the Export of Terrorism," *Department of State Bulletin* 67, no. 1745 (4 December 1972): 645; David Williamson, Jr., "Terrorism: What Should We Do?" in *Terrorism*, ed. Steven Anzovin, The Reference Shelf, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 173; and "Control of Terrorism in International Life: Cooperation and Self-Help," in American Society of International Law, *Proceedings of the 71st Annual Meeting*, 21–23 April 1977 (Washington, D.C.: 1977), 18–19.

39. State Department, "Global Terrorism," inside front cover.

40. Jenkins, "Study of Terrorism," 3-4. See also Brian M. Jenkins, "International Terrorism: Trends and Potentialities," *Journal of International Affairs* 32, no. 1 (1978): 116. The only US federal statute containing a definition of international terrorism is the *Foreign Intelligence Surveillance Act* (FISA), *US Code*, Title 50, chap. 36, sec. 1801. The FISA definition is a narrow one drafted for the limited purpose of providing the FBI with jurisdiction overseas and for the purpose of issuing warrants. International terrorism is defined as:

> 1. Violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any state [thereof], or that would be a criminal violation if committed within the jurisdiction of the United States or any state [thereof];
>
> 2. [Acts that] appear to be intended
>
> A. to intimidate or coerce a civilian population.
>
> B. to influence the policy of the government by intimidation or coercion; or
>
> C. to effect the conduct of a government by assassination or kidnapping; and

3. [Actions that] occur totally outside the United States or transcend national boundaries in terms of the means by which they are accomplished, the person they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

41. Jenkins, *A New Mode of Conflict*, 9.

42. Andrew J. Pierre, "The Politics of International Terrorism," in *Contemporary Terrorism*, ed. John D. Elliott and Leslie K. Gibson (Gaithersburg, Md.: International Association of Chiefs of Police, 1978), 36; reprinted from *Orbis* 19, no. 4 (Winter 1976).

43. Jenkins, *A New Mode of Conflict*, 11.

44. L. C. Green of the University of Alberta reminds us that "international law is only concerned with issues affecting the interests of more than one country. In so far as terrorism is concerned this means that the act in question must in one way or another be transnational in character." Green, "International Law and the Control of Terrorism," *Dalhousie Law Journal* 7, no. 2 (April 1983): 244.

45. Central Intelligence Agency (CIA), National Foreign Assessment Center, "Patterns of International Terrorism: 1980," June 1981, ii. See also Jenkins, "Study of Terrorism," 4. This distinction between international terrorism and transnational terrorism was also made in 1986 during the Dynamics of International Terrorism Course, USAF Special Operations School, Hurlburt Field, Fla., and Legal Aspects of Terrorism Course, the US Army Judge Advocate Generals School, Charlottesville, Va.

46. See Farrell, 68; Friedlander, 85; and Lt Col Donald B. Vought, USA, Retired, and Lt Col James H. Fraser, Jr., USA, "Terrorism: The Search for Working Definitions," *Military Review* 66, no. 7 (July 1986): 75.

47. The distinction made between the international and transnational terrorist is that the former is state-sponsored or state-supported while the latter acts autonomously without state sponsorship or support. Some argue that these terms are dated and that state-sponsored terrorism should be used instead of international terrorism and nonstate-sponsored terrorism should be used instead of transnational terrorism.

48. See generally Gail Bass et al., *Options for U.S. Policy on Terrorism* (Santa Monica, Calif.: Rand Corp., 1981), 6, Rand, R-2764-RC; and Louis G. Fields, Jr., "The Third Annual Waldemar A. Solf Lecture in International Law: Contemporary Terrorism and the Rule of Law," *Military Law Review*, no. 113 (Summer 1986): 11.

49. John F. Murphy quoted in "Terrorism and Countermeasures: Is Section 905 of the Revised Restatement Helpful?" in *International Law Practitioner's Handbook*, no. 32 (May 1986): 12.

50. Shultz, "Terrorism: The Challenge to Democracies," address before the Jonathan Institute's second Conference on International Terrorism, Washington, D.C., 24 June 1985, in Anzovin, 55; reprinted from *Department of State Bulletin* 84, no. 2089 (August 1984).

51. CIA, "Patterns of Terrorism," iii.

52. Senate, *State-Sponsored Terrorism*, 47–48. See also Brian Michael Jenkins, "Military Force May Not Be Ruled Out," Rand, 7103, Rand Corp., Santa Monica, Calif., June 1985, 2; and Lynch, 4–5.

53. See State Department, "Global Terrorism," 4. For Libya's role in sponsoring international terrorism, see Foreign and Commonwealth Office, "Libyan State Terrorism," background brief, April 1986, 1–4; Department of State, "Libya under Qadhafi: A Pattern of Aggression," Special Report 138, January 1986, 1–8; Department of State, Office for Combatting Terrorism, "Libya Talking Points," 1 April 1986, 1; Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1977*, ed. John A. Boyd (Washington, D.C.: 1979), 209, State Department, 8960; Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Hearings on Terrorism: The Role of Moscow and Its Subcontractors*, 97th Cong., lst sess., 26 June 1981, series no. 97-44, 15–16; David Segal, "Libya: Millions for Murder: Khadaffi Bankrolls World Terror," *Soldier of Fortune*, August 1986, 108; and *Political Terrorism*, vol. 2, 1974–1978, ed. Lester A. Sobel (New York: Facts on File: 1978), 16.

54. See Vice President, *Report on Terrorism*, 2; and Marian Nash Leich, "Four Bills Proposed by President Reagan to Counter Terrorism," *American Journal of International Law* 78, no. 4 (October 1984): 915.

55. See Bass et al., 10–11; Department of Defense, *Soviet Military Power, 1986* (Washington, D.C.: 1986), 124–28; Maj John G. Humphries, USAF, "International Terrorism as a Lawful Form of Warfare: An Idea Whose Time Should Not Arrive," student research paper 86-1200 (Maxwell AFB, Ala.: Air Command and Staff College, April 1986), 1; "1980s: Decade of Confrontation?" 239–60; Senate, *State-Sponsored Terrorism*, 8–9; Senate, *Hearings on Terrorism*, 4–6; Shultz, "Terrorism: The Challenge," 55; Dobson and Payne, xi–xiii; Samuel T. Francis, *The Soviet Strategy of Terror* (Washington, D.C.: Heritage Foundation, 1981); Roberta Goren, *The Soviet Union and Terrorism* (London: George Allen and Unwin, 1984); Claire Sterling, *The Terror Network: The Secret War of International Terrorism* (New York: Reader's Digest Press, 1981); Wardlaw, 55–56; Lynch, 19; Robert C. McFarlane, "Terrorism and the Future of Free Society," in American Bar Association, Committee on Law and National Security, *Intelligence Report* 7, no. 5 (May 1985): 7; and Drew Middleton, "Soviets Seen Adopting 'Low-Intensity Warfare'," *Air Force Times*, 5 August 1986, 69.

56. See "Preface," Anzovin, 5; Richard B. Lillich, *Transnational Terrorism: Conventions and Commentary* (Charlottesville, Va.: Michie Co., 1982), xiii; Wardlaw, 18–24; and Col William D. Neale, USA, Retired, "Oldest Weapon in the Arsenal: Terror," *Army* 23, no. 8 (August 1973): 10–17.

57. Friedrich Nietzsche quoted in Neale, 11.

58. Niccolò Machiavelli quoted in ibid.

59. Mikhail Bakunin quoted in ibid.

60. Wilkinson, *Terrorism and the Liberal State*, 180–81.

61. Vice President, *Report on Terrorism*, "Preamble/Foreword."

62. See *Soviet Military Power*, 125; Department of State, Office for Combatting Terrorism, "Fact Sheet: World-wide Terrorism" (1986); Bass et al., 1; Marks and van Ostpal, 6–7; Rushworth M. Kidder, "The Libyan Raid: Four Months Later," *Christian Science Monitor*, 11 August 1986, 21; Jeffrey D. Simon, "Global Perspective: The Year of the Terrorist," *TVI Report* 6, no. 3 (Winter 1986): 1; Scott C. Truver, "Maritime Terrorism, 1985," US Naval Institute, *Proceedings* 112 (May 1986), 161; Andrew Whitley, "Deaths from Terrorism 'Double in 1985'," *Financial Times*, 14 August 1986, 4; and "Special Report: Terrorism," *The World and I*, no. 3 (March 1986), 38–102.

63. See Lt Col William R. Farrell, USAF, "Responding to Terrorism: What, Why and When," *Naval War College Review* 39, no. 1 (January–February 1986): 49.

64. A study of the Israeli situation found that terrorism inflicted 0.5 percent of the total number of casualties (exogenous deaths and injuries) but counterterrorism consumed about 61.9 percent of Israel's total casualty-preventing expenditures. The reason, according to the study, is that Israel perceives terrorism as a major threat not based on statistics but on other factors. Another possibility might well be that the heavy expenditures have resulted in a highly successful program. See Lt Col Hanan Alon, Israeli Defense Forces, "Terrorism and Countermeasures: Analysis versus a Participant's Observation," in *Terrorism and Beyond: An International Conference on Terrorism and Low-Intensity Conflict*, ed. Brian M. Jenkins (Santa Monica, Calif.: Rand Corp., December 1982), 233–39, Rand, R-2714-DOE/DOJ/DOS/RC.

65. Information provided by L. Carter Cornick, Jr., supervisory special agent, Terrorist Research and Analysis Center, Criminal Investigative Division, Federal Bureau of Investigation, to the Eighth Legal Aspects of Terrorism Course, US Army Judge Advocate Generals School, Charlottesville, Va., 20 October 1986.

66. Jenkins, *A New Mode of Conflict*, 12.

67. Brian Jenkins, "Future Trends in International Terrorism," presented at Defense Intelligence College, Washington, D.C., Rand, 7176, Rand Corp., Santa Monica, Calif., December 1985, 3.

68. Jenkins, "Fighting Terrorism," 5.

69. "Perhaps we count the wrong things," writes Brian M. Jenkins, "more likely, the things we can count do not reflect our perceptions of the phenomenon. Terrorism is not simply what terrorists do, but the effects—the publicity, the alarm—they create by their actions." Jenkins, "Trends and Potentialities," 119.

70. Marks and van Ostpal, 5.

71. Vice President, *Report on Terrorism*, 10. According to Brian Jenkins, "Prior to the 1973 Yom Kippur War, a senior Israeli officer estimated that

the total cost in men and money to Israel for all defensive and offensive measures against at most a few thousand Arab terrorists was 40 times that of the Six Day War in 1967." Jenkins, *A New Mode of Conflict*, 21.

72. George P. Shultz quoted in Senate, *State-Sponsored Terrorism*, 38.

73. Jenkins, "Fighting Terrorism," 3.

74. See Brian Michael Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984, 3; and Wilkinson, "Can a State Be a 'Terrorist'?" 469.

75. Robert Grant, "Terrorism: What Should We Do?" in Anzovin, 160.

76. See Laqueur, 87; Trent, 79–81; and Senate, *State-Sponsored Terrorism*.

77. Trent, 82.

78. Marks and van Ostpal, 5. See also Senate, *State-Sponsored Terrorism*, 5.

79. Marks and van Ostpal, 6.

80. McFarlane, 5.

81. Adm James D. Watkins, USN, "Terrorism: An 'Already Declared' War," *Wings of Gold* 9, no. 2 (Summer 1984): 19.

82. See William J. Casey, "International Terrorism: Potent Challenge to American Intelligence," address at the Fletcher School of Law and Diplomacy, Tufts University, Medford, Mass., 17 April 1985, in Anzovin, 59–60; reprinted from *Vital Speeches* 51, no. 23 (15 September 1985): 713–17. See also David L. Milbank, "International and Transnational Terrorism: Diagnosis and Prognosis," in Elliott and Gibson, 66–67.

83. See Senate, *State-Sponsored Terrorism*, 13.

84. See ibid., 15. See also Neil C. Livingstone and Terrel E. Arnold, "The Rise of State-Sponsored Terrorism," in *Fighting Back: Winning the War against Terrorism*, ed. Livingstone and Arnold (Lexington, Mass.: D. C. Heath and Co., 1986), 11–12. They also note that "Soviet Foreign Minister Andrei Gromyko reportedly offered the Spanish government of Prime Minister Felipe Gonzalez a deal whereby Moscow would end its support of the Basque Homeland and Liberty Movement [*Euzkadi ta Azkatasuna—ETA*] in exchange for Spain's agreement not to join NATO." Livingstone and Arnold, "Rise of Terrorism," 13.

85. See James Berry Motley, "Target America: The Undeclared War," in *Fighting Back*, ed. Livingstone and Arnold, 70. See also Jenkins, "Combatting Terrorism Becomes a War," 2.

86. See Gerald M. Boyd, "Iran Is Said to Get U.S. Weapons Aid in a Hostage Deal," *New York Times*, 7 November 1986, 1; William Drozdiak and Walter Pincus, "Iran Says McFarlane Carried Out Secret Mission to Iran," *Washington Post*, 5 November 1986, 1; and Walter Pincus, "Shultz Protested Iran Deal," *Washington Post*, 7 November 1986, 1.

87. See Department of State, Bureau of Public Affairs, "International Terrorism: U.S. Policy on Taking Americans Hostage," Washington, D.C., June 1986.

88. See Bass et al., 7; and Jenkins, *Terrorism and Beyond*, 5.

89. See Frank Brenchley, "Diplomatic Immunities and State-Sponsored Terrorism," *Conflict Studies* 164 (1984): 2.

90. See Karen DeYoung, "Britain Cuts Ties with Syria over El Al Bombing Links: Hindawi Guilty; Damascus Reacts," *Washington Post*, 25 October 1986, 1(A) and 19(A).

91. Friedlander, 86–87.

92. Brian M. Jenkins, "International Terrorism: A Balance Sheet," in Elliott and Gibson, 224.

93. See, "Austria Seeks 'Atom Guerilla'," *San Jose Mercury*, 23 April 1974, as quoted in Forrest R. Frank, "Nuclear Terrorism and the Escalation of International Conflict," *US Naval War College International Law Studies* 62 (1980): 535.

94. Senate, *State-Sponsored Terrorism*, 2.

95. See Sterling; and Rivers, 88–101.

96. See Casey, 61; and Laqueur, 89–98.

97. See Casey, 66. See also Brian Michael Jenkins, "Combatting Terrorism: Some Policy Implications," Rand, 6666, Rand Corp., Santa Monica, Calif., August 1981, 3–6; and Wilkinson, *Terrorism and the Liberal State*, 199–200.

98. Jenkins, "A Balance Sheet," 20. See also Kenneth E. Roberts, "Terrorism and the Military Response," Strategic Studies Institute, Army War College, Carlisle Barracks, Pa., October 1975, 2–4.

99. Marks and van Ostpal, 4. See also Thomas M. Franck, "International Legal Action Concerning Terrorism," *Terrorism: An International Journal* 1, no. 2 (1978): 189; Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 49; Schmid, 206–8; Wilkinson, *Terrorism and the Liberal State*, 181–84; and Maj Jeffery W. Wright, USA, "Terrorism: A Mode of Warfare," *Military Review* 64, no. 10 (October 1984): 38.

100. Andrew M. Scott, *The Revolution in Statecraft: Informal Penetration* (New York: Random House, 1969).

101. Ibid., 166.

102. See Wilkinson, *Terrorism and the Liberal State*, 199.

103. See Edgar O'Ballance, "Terrorism: The New Growth Form of Warfare," in *International Terrorism in the Contemporary World*, ed. Marius H. Livingston, Lee Bruce Kress, and Marie G. Wanek, Contributions in Political Science, no. 3 (Westport, Conn.: Greenwood Press, 1978); Jenkins, "Combatting Terrorism Becomes a War"; Jenkins, *A New Mode of Conflict*; and J. Wright.

104. See Robert H. Kupperman, Debra van Ostpal, and David Williamson, Jr., "Terror, the Strategic Tool: Responses and Control," *Annals of the Amercian Academy of Political and Social Science* 463 (September 1982): 24.

105. See Stephen Sloan, *Beating International Terrorism: An Action Strategy for Preemption and Punishment* (Maxwell AFB, Ala.: Air University Press, December 1986), 4 and 7.

106. See Gordon A. Christenson quoted in "Controlling Transnational Terrorism: The Relevance of International Law," in American Society of International Law, *Proceedings of the 72nd Annual Meeting*, 27-29 April 1978 (Washington, D.C.: 1978), 348.

107. Jacques Bergier's book is discussed in Gerardo Jorge Schamis, *War and Terrorism in International Affairs* (New Brunswick, N.J.: Transaction Books, 1980), 35-38.

108. See Jenkins, "Combatting Terrorism Becomes a War," 1; Jenkins, "Future Trends," 5-6; Livingstone and Arnold, "Democracy under Attack," in *Fighting Back*, ed. Livingstone and Arnold, 3-5; and Milbank, 72.

109. See Senate, *State-Sponsored Terrorism*, 68; M. Asa, "Forms of State Support to Terrorism and the Possibility of Combating Terrorism by Retaliating against Sponsoring States," in *On Terrorism and Combating Terrorism*, ed. Ariel Merari (Frederick, Md.: University Publications of America, 1985), 119-26; Jenkins, "A Strategy for Combatting Terrorism," Rand, 6624, Rand Corp., Santa Monica, Calif., May 1981, 6; Netanyahu, 48-52; and William L. Waugh, Jr., *International Terrorism: How Nations Respond to Terrorists* (Salisbury, N.C.: Documentary Publications, 1982), 137-39.

110. See Marks and van Ostpal, 1.

111. See US Army, Training and Doctrine Command, *Joint Low-Intensity Conflict Project*, vol. 1, *Analytical Review of Low-Intensity Conflict* (Fort Monroe, Va.: 1 August 1986), 5-1.

112. Department of Defense, *U.S. Military Force Posture FY-1986* (Washington, D.C.: 1985), 94-95. Regarding the analysis of the threat of international terrorism, governments, media, and the terrorists themselves tend to overestimate the threat while the military—concerned about roles, missions and funding—tends to underestimate it.

113. Concerning the problem of educating the public as to the threat, see Vice President, *Report on Terrorism*, 17; and Sloan, xiv.

CHAPTER 2

INTERNATIONAL LAW AND INTERNATIONAL TERRORISM: WHICH APPROACH SHOULD WE TAKE?

Criminal means once tolerated is soon preferred.

Edmund Burke

[Terrorism] is not just criminal activity, but an unbridled form of warfare.

George P. Shultz

The Western democracies are still not aware of it as warfare against them.

Lord Chalfont

Some experts see terrorism as the lower end of the warfare spectrum, a form of low-intensity, unconventional aggression. Others, however, believe that referring to it as war rather than criminal activity lends dignity to terrorists and places their acts in the context of accepted international behavior.

Vice President's Task Force on Combatting Terrorism

International law offers two approaches to international terrorism. States can treat terrorism as a law enforcement problem or they can invoke the law of armed conflict. The law enforcement approach considers international terrorism as primarily a civil police responsibility. The objective is to deter terrorists, but, failing that, to manage them successfully through arrest, prosecution, and imprisonment. Consequently, this approach seeks to improve law enforcement by promoting international agreement and cooperation among nations. Outlawing terrorism—making it a universal international crime like piracy or slave trading—is the ideal. For the present, states have emphasized negotiating new treaties to define specific terrorist acts as crimes. Conventions

on aerial hijacking, letter bombs, and attacks on protected persons such as diplomats are examples. Information exchange and judicial cooperation are essential ingredients of this approach. Nations have focused their attention on extradition agreements and on redefining narrowly the political offense escape clause. Terrorists are viewed as ordinary criminals and not as engaging in combatant activity. In exceptional circumstances when the use of military force abroad is required, that action occurs in the context of a response to a peacetime crisis.

The law of armed conflict approach considers international terrorism as primarily a military responsibility. Terrorists are viewed as unlawful or unprivileged combatants engaging in warlike or combatant activity. As such, terrorists are criminals whose arrest, prosecution, and imprisonment are universal obligations of all states in accordance with the 1949 Geneva conventions. When the use of military force abroad is required, such use takes place in the context of armed conflict.

Under both approaches the terrorist is a criminal. However, it is incorrect to believe that terrorists would be given a status under the law of armed conflict other than that of unlawful combatants engaging in criminal conduct. The differences in these two approaches are highlighted by the choices offered in the following questions: Should international terrorism be a civil police or military responsibility? Should international terrorism be viewed as ordinary criminal activity or combatant activity? Is terrorism simply a crime or is it surrogate warfare? Should use of force abroad against international terrorists and their state sponsors or supporters be viewed as a peacetime crisis or as a response to armed conflict?

Among the factors to consider in deciding which is the best approach to international terrorism are foreign policy and other political considerations, the nature of the threat, and the advantages and disadvantages of each approach. Foreign policy and other political considerations are beyond this study. The nature of the terrorist threat has been discussed in chapter 1. This chapter identifies the approach adopted by the West, including the United States; discusses the reasons for this approach and its advantages

and disadvantages; and examines the alternate approach and its advantages and disadvantages.

West Opts for Law Enforcement Approach

The United States and other like-minded governments have tended to treat terrorists as ordinary criminals subject to prosecution under domestic criminal law. Most efforts in the international arena have been directed at finding ways to enhance the effectiveness of applying domestic criminal law to terrorists. These efforts have included, for example, improving extradition procedures and bringing into being new multilateral and bilateral conventions criminalizing various acts of terrorists—such as aircraft hijacking—that can be prosecuted by national judicial authorities.

The United States government and other Western democracies have organized to deal with terrorism in terms of law enforcement. The lead US agency for *domestic* terrorism is the Federal Bureau of Investigation (FBI). The FBI has transferred terrorism responsibility from its intelligence and sabotage division to its criminal division. This shift reflects the thinking of senior leadership that the terrorist is an ordinary criminal not a combatant. The Department of State, not the Department of Defense, is the lead US agency for *international* terrorism. Basic cooperation among nations is at the police-to-police or judiciary-to-judiciary level.

Law enforcement responsibility is primarily a civil police and not a military function. In instances where military force has been used overseas against international terrorists or their sponsors, the action has been akin to law enforcement (hostage rescue attempts, for example) or punishment of a state sponsor (the April 1986 raid on Libya). The state sponsoring or supporting international terrorism may be viewed as engaging in "armed aggression against the United States . . . just as if [it] had used its own armed forces" but international terrorists themselves will not be so recognized.[1]

The military may feel uneasy and uncertain about its role in essentially a law enforcement function. Terrorists are not combatants, and military action is not taken in a warlike context.

Military actions against terrorists are characterized as a response to a peacetime crisis and not an armed conflict. Moreover, in today's world, military force generally is seen as an ineffective means to project power abroad. Hence, in this context, the law of armed conflict does not apply to international terrorists.

Some may argue that this view is changing and that terrorism now is viewed as essentially a form of warfare. Brian Jenkins of the Rand Corporation has concluded that "terrorism indeed has become a new mode of warfare."[2] Terrorist expert Paul Wilkinson of the University of Aberdeen agrees: "International terrorist attack is simply a different mode of war, not an alternative to war as such."[3] But other experts do not fully agree. Some experts see a trend in that direction but are guarded as to whether terrorism has really become warfare.[4]

Government officials in the United States have joined the discussion with some strong words about terrorism as warfare. Jeane J. Kirkpatrick, former US permanent representative to the United Nations, has asserted that "terrorism is a form of war."[5] Ambassador Vernon Walters, her successor, agrees, "We are not dealing here with the acts of individuals or groups but rather with a state policy to use force by clandestine means or, as one speaker in the debate put it, 'war by another name'."[6] Secretary of State George Shultz is quoted as saying that terrorism is "no longer the random acts of isolated groups or local fanatics," but rather it "is now a method of warfare."[7] The Long commission, appointed by Secretary of Defense Caspar Weinberger to investigate the October 1983 bombing of the Marine Corps headquarters in Beirut, characterizes the threat to the United States as "terrorist warfare, sponsored by sovereign states or organized political entities to achieve political objectives."[8]

Ambassador Robert Oakley, head of the Department of State, Office of Counter-terrorism, speaking in September 1985, placed terrorism into the conflict spectrum as a "form of low-intensity warfare."[9] Although Defense Department agencies continued to struggle with the issue, the Joint Chiefs of Staff (JCS), in November 1985, approved a definition of low-intensity conflict that included terrorism.

> Low-intensity conflict is a limited politico-military struggle to achieve political, social, economic, or psychological objectives. It is often protracted and ranges from diplomatic, economic, and psychosocial pressures through terrorism and insurgency. Low-intensity conflict is generally confined to a geographical area and is often characterized by constraints on the weaponry, tactics, and level of violence.[10]

But, as regards terrorism, the armed services to date have developed no doctrine, strategy, tactic, training, or force structure based on this definition of low-intensity conflict. Congress, in the 1986 Defense Reorganization Act, has given the Defense Department a strong nudge to develop these written standards. Yet, one has to wonder whether these military deficiencies exist because the military sees low-intensity conflict, including terrorism, as a low priority, as Congress suspects, or because the military does not believe that international terrorism should be characterized as a form of warfare. Conceptualizing and planning for a nonwarlike activity cannot be an easy task for the military.

How, then, do we assess the current discussion? The talk about terrorism being a form of warfare is just that, talk. It is an attempt to convey or emphasize the seriousness of the perceived threat, but it is not intended that the legal consequences of calling terrorism *warfare* should follow. The term is used in the generic sense as one would speak of the war on poverty or the war against illiteracy. The primacy of the criminal element of terrorism is clearly manifest in official US government actions and statements. In the words of President Ronald Reagan, terrorists "must be treated as to what they really are. And that is, they are base criminals."[11] The aim, according to Ambassador Louis Fields, is to recognize that "terrorist crimes, like all crimes, should be universally condemned and universally prosecuted."[12] Terrorism is essentially criminal activity within the domain of law enforcement authorities.

Why the Bias toward Law Enforcement?

More and more writers on the subject have taken the position that "the key to an effective response to the threat posed by ter-

rorist states is the commitment to address the attacks they sponsor within the scope of armed conflict.''[13] Yet, the law enforcement approach stands unchallenged. Dr Stephen Sloan, a former senior research fellow at the Air University Center for Aerospace Doctrine, Research, and Education, could write correctly in mid-1986 that ''terrorism is still *not* viewed by various civilian policymakers in general and by the military in particular to be a form of warfare.''[14]

Law Enforcement: The Only Alternative

Why? First, there has been no serious research into an alternative to the law enforcement approach. No US government department or agency has studied the pros and cons of the law of armed conflict approach. The Vice President's Task Force on Combatting Terrorism did not address the issue. The task force's final report simply noted that some experts see terrorism as a form of warfare while others ''believe that referring to it as war rather than criminal activity lends dignity to terrorists and places their acts in the context of accepted international behavior.''[15] The report does not draw a conclusion as to which view is correct but notes that Americans know terrorism when they see it. Neither private scholars nor jurists have prepared a detailed study either.

Although policymakers may have selected the proper approach to international terrorism, they have done so without the benefit of a review of the advantages and disadvantages of each approach. Moreover, so strongly held is the belief that the law enforcement approach is the correct one that policymakers may be reluctant to even consider an analysis which may challenge the current approach. Fundamental beliefs are like that.

Terrorism as a Form of Aggression Is Denied

Second, as Yale University law professor Eugene Rostow proposes, the psychological mechanism of denial may be at work in this instance. In an article titled ''Overcoming Denial,'' he admonishes:

> We understand what is happening in the world. But we resist confronting our knowledge, as our fathers resisted confronting the truth about Hitler fifty years ago. . . . What can we do about state-sponsored terrorism? We must first recognize that it is a form of aggression. Aggression is the most serious of all violations of international law, a profound threat to the state system on whose stability and viability peace depends.[16]

International terrorism is recognized as a threat to national security. Is it more appropriate to manage such a threat using the law enforcement or law of armed conflict approach? This question cannot be answered until denial is overcome and we decide to look critically at the advantages and disadvantages of each approach.

Law of Armed Conflict Misunderstood

Third, misconceptions about the law of armed conflict approach have driven us to embrace the law enforcement approach. High-ranking policymakers and jurists hold false beliefs about the law of armed conflict as a body of law and what it means if it is applied to international terrorism. They incorrectly believe that the choice is between treating terrorists as criminals under the law enforcement approach or as combatants under the law of armed conflict approach. They are unaware that the law of armed conflict would treat terrorists as criminals, would recognize them as engaging unlawfully in combatant activity, would consider them as unlawful combatants, and would deny them legitimacy by identifying them as perpetrators of acts contrary to the fundamental international humanitarian law that serves as a basis of the law of armed conflict. Because such misconceptions are deeply held, accepting terrorism as warfare and adopting the law of armed conflict approach have become unthinkable.

Abraham Sofaer, State Department legal adviser, unequivocally believes "terrorism, in essence, is criminal activity."[17] This assessment, although accurate, is not dispositive of which approach to terrorism should be taken because both approaches would treat international terrorists as criminals. Sofaer erroneously continues: "Another approach has been to secure for terrorism a legal status that obscures or denies its fundamental criminal nature. The laws

of war mark the line between what is criminal and what is an act of combat."[18] His statement contains at least three misconceptions.

1. *If the law of armed conflict is applied to international terrorists, then they will receive legal status that implies acceptance of their methods.* However, the law of armed conflict condemns terrorist methods as unlawful.

2. *There is a wall between criminal law and the law of armed conflict as if the latter did not address criminal activity.* The law of armed conflict, to the contrary, includes provision for war crimes and grave breaches of the 1949 Geneva conventions, and provides for universality of criminal jurisdiction.

3. *If the law of armed conflict were applied to international terrorists, then they would be given combatant status.* In fact, however, the law of armed conflict recognizes that not all persons who engage in combatant activity are combatants entitled to prisoner of war (POW) status. Some, like terrorists, are unprivileged or unlawful combatants.

Policymakers, and therefore policy, have been influenced by these incorrect legal views.

The following statement of Noel C. Koch, a former senior Department of Defense official responsible for terrorist issues, serves as a clear example:

> There is a legalistic perspective that sees the acts in question as crimes and their perpetrators as criminals; this is placed against a more general tendency to see terrorism as "war." But if war, then its practitioners may be subject to the laws of war, and those apprehended in its practice may be "prisoners of war" as they insist, rather than merely impressionable pawns turned into criminals by more clever, and evil men. The point is not academic. It would be grotesque to afford terrorists the rights that belong to legitimate combatants under the laws of war.[19]

These issues are not academic, they fundamentally impact on the choice of approach to terrorism. But Koch's analysis contains certain misconceptions.

First, *if the law of armed conflict is applied to international terrorists, then they will somehow cease to be criminals.* However, the issue is not whether the acts of terrorists constitute crimes or not. The acts of terrorists are criminal under both national

domestic law and the law of armed conflict. At issue is how best to treat terrorism. Based on the factual situation presented, is the better approach to international terrorism essentially to treat it as deviant societal conduct of a criminal nature within the context of law enforcement or to treat it as a form of warfare governed by the law of armed conflict, *including its criminal law provisions?*

Second, *if the law of armed conflict is applied to international terrorism, then terrorists become lawful combatants entitled to POW status if captured.* Under the law of armed conflict, however, terrorists are neither lawful combatants nor entitled to POW status.

Third, *if the law of armed conflict is applied, then the acts of international terrorists will be sanctioned or approved by the international community and terrorists will have achieved both status and recognition for their cause.* This contention is simply incorrect. Because a body of law is applied to an activity or conduct does not mean that the law approves of that conduct. When domestic criminal law addresses the murderer it does not, thereby, approve murder. The law of armed conflict addresses terrorist acts as either war crimes or grave breaches of the Geneva conventions and, instead of approving of terrorism, condemns those acts. Rather than bestowing status or recognition on international terrorists and their state sponsors or supporters, the law of armed conflict identifies participation in such acts as universal crimes that bring no honor. In the words of Dr Sloan, "It must be stressed however that recognizing that terrorism may be more than a criminal act does not mean to imply that the perpetrator has some degree of legitimacy for his or her actions."[20]

Imprecise Dividing Line between Peace and War

Fourth, and finally, inadequate research, denial, and misconceptions have contributed to a belief that treating terrorists as criminals requires a law enforcement approach. We do not understand what it truly means to treat terrorism as a form of warfare. "Many, for example," notes Harry Summers, a recognized writer on military strategy, "give lip-service to the idea that terrorism is a form of warfare, but few understand what that admission entails."[21] National leaders see the problem for the most part not

as a lack of understanding but as a condition of the existing political scene. Former secretary of defense Caspar Weinberger notes, for example, "In today's world, the line between peace and war is less clearly drawn than at any time in our history."[22] Secretary Shultz discusses why this situation exists:

> Among the factors contributing to this lack of understanding are our perceptions that the nation and the world are either at war or at peace, with the latter being the normal state; and the existence of a well-resourced campaign by our adversaries to create and support misunderstanding of the means and ends of this confrontation.[23]

A realization of a lack of understanding can be healthy. It can lead to research, to rejection of denial, and to dispelling misconceptions. Understanding can be improved but where are the inquiring initiatives?

Managing International Terrorism

In rethinking the issue of how to approach terrorism, we must focus on managing international terrorism. Domestic terrorism—that is, terrorism that occurs within the borders of a particular state and has no international implications—is criminal activity within the domestic criminal law jurisdiction of that country. The only applicable approach to domestic terrorism is the law enforcement approach.

International law governs relations between states and, generally speaking, is not concerned with matters within a state's domestic jurisdiction. Whether the law of armed conflict, as part of international law, should apply to international terrorism, as defined in chapter 1, is open for consideration.

Although both approaches, law enforcement and law of armed conflict, potentially could be applied to international terrorism, the issue is somewhat more complex than simply choosing between them. It may be inappropriate to take the same approach to all types of international terrorism. The law enforcement approach might be the best, if not the only, way to deal with international terrorism that is not state sponsored or supported. However, that assessment might change if the organization engag-

ing in terrorist acts, even though not state sponsored or supported, has been recognized as having status as an international entity. The PLO, for example, may have such status although a case can be made that the PLO is sponsored or supported by several states.

The law of armed conflict, as part of international law, applies between states and recognized international entities. If an international terrorist organization is not state supported or sponsored nor recognized as an international entity, then the law of armed conflict by its own terms may well not apply to the situation. However, since the focus of this study is limited to state-sponsored and -supported international terrorism, both approaches conceivably may apply.

Thrust of the Law Enforcement Approach

The central feature of the law enforcement approach is to make terrorism synonymous with crime.[24] But making the law enforcement approach work requires international cooperation. Terrorists are prosecuted for their acts in domestic courts in accordance with domestic law. No international tribunal tries them. When terrorists flee the jurisdiction of the state in which they have committed their criminal act (a modus operandi of international terrorists), that state must seek the judicial assistance of the state to which they have fled. The objective is to have the state in whose jurisdiction the terrorists have sought haven either prosecute or extradite them. Achieving and improving cooperation with foreign law enforcement authorities so that the offenders do not escape punishment is the primary goal of the United States.[25] But "attempts to stretch the authority of a legal system across international boundaries inevitably leads to collisions with elements of the sovereign-state system, especially jurisdictional barriers and a tendency among law enforcement agencies to give low priority to another country's crime."[26]

This section assesses four aspects of the law enforcement approach. The first two concern the effectiveness of efforts to strengthen international cooperation and agreements to improve extradition and to criminalize acts of terrorists. The remaining

two, arresting and imprisoning terrorists, concern the appropriateness of treating terrorists as ordinary criminals.

Extradition

Improving extradition is an essential element of the law enforcement approach. "Most acts committed in the course of political disturbances [are] intended to disrupt the political order of states [but] have been considered as 'political acts' [thereby] ruling out extradition" because of the political offense exception.[27] Moreover as is "clear from years of debate on terrorism and the history of extradition . . . no viable international . . . community consensus exists in the area of political crimes."[28]

Achieving international cooperation in this area has been difficult. The key problem has been the political offense escape clause in extradition agreements, which gives a requested nation the right to deny extradition to the requesting nation. Closing this loophole has proven to be a monumental task. How can this clause be narrowed to exclude terrorists but retain its original purpose of protecting dissidents and other like-minded persons from persecution through prosecution for their politically held beliefs? How can third world support be obtained in light of their primary concern for national liberation movements? How do you obtain the cooperation of states that sponsor, support, or tolerate international terrorism by providing terrorists with safe havens?

The effort of the European community and the revised United States–United Kingdom extradition agreements are unusual successes in this area.[29] The 1977 European Convention on the Suppression of Terrorism removes the political offense exception from extradition requests for certain offenses such as aircraft hijacking, serious attacks on internationally protected persons, kidnapping, hostage taking, and use of explosives and firearms to endanger persons. Similarly, the 1985 supplement to the United States–United Kingdom extradition treaty removes the political offense exception for selected crimes, such as aerial hijacking and murder of diplomats, that are associated with terrorism. Noteworthy is the fact that successes to date have been achieved only among the Western democracies.

Also significant is the fact that even United States courts, as demonstrated in *Eain v. Wilkes*, have difficulty with the political offense issue if forced to address it.

> The evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure . . . and thus directs its destructive efforts at a defined civilian population. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts.[30]

With these words, the *Eain* court places the emphasis, not on law, but on logic. Much remains to be done to make extradition an effective tool in combating terrorism.

Criminalizing Terrorist Acts

A second aspect of the law enforcement approach is an initiative to provide a sounder basis for judicial cooperation among states through a common agreement on the definition of the crime involved. This initiative has been pursued at two levels: one to outlaw terrorism generally as an international crime, and the other to identify specific acts committed by terrorists and make them international crimes.

The first general attempt to outlaw terrorism occurred in 1937, in the form of a draft Convention on the Prevention and Punishment of Terrorism.[31] But the draft convention never entered into force. The effort failed in large measure because World War II occupied the affairs of states and because the interest of the international community in the subject waned. A general convention was not given serious consideration again until 1972, when the United States introduced in the United Nations the text of a proposed agreement to outlaw terrorism. This effort also failed, not for any lack of interest, but because the United Nations became

embroiled in a debate of terrorist causes rather than focusing on terrorist acts.[32] Consequently, no general convention is in force today that makes terrorism per se an international crime.

A recent effort of international law scholars to draft a general convention outlawing terrorism deserves mention because those scholars have taken a unique approach to the problem. They seek to adopt for law enforcement purposes the criminal standard contained in the law of armed conflict. These scholars believe that "if terrorism is prohibited in time of war, clearly it must be prohibited in time of peace."[33] The language proposed in 1982 by the International Law Association (ILA), Committee on Terrorism, reads as follows:

> No person shall be permitted to escape trial or extradition on the ground of his political motivation who, if he performed the same acts as a soldier engaged in an international armed conflict, would be subject to trial or extradition.[34]

Even though this language has been weakened in later drafts, the ILA proposal has little hope of going anywhere.[35] Support for any general convention on terrorism does not now exist. This effort does show, however, the growing concern about the inequality between the criminal law enforcement standards in time of peace and those prevailing in time of armed conflict.

Efforts to make criminal specific terrorist acts, such as airplane hijacking, hostage taking, and attacks on diplomatic personnel, have been more successful.[36] These conventions have been of limited usefulness, however, because of loose language, nonratification by states that sponsor or support international terrorism, and lack of enforcement measures for noncompliance.[37]

Arresting Terrorists

The law enforcement approach considers terrorists to be ordinary criminals and seeks to treat them as such. But is it appropriate to consider terrorists as ordinary criminals? What are the implications of such treatment? The first area of concern is the way that the arrest process functions. The kind and degree of force authorized in the arrest process are very different from

the type and level of force applied in a combat situation. The contrast is "between the principle of minimal use of force as practiced by police and the military philosophy to use all necessary force to achieve the objective."[38] The use of force for civil law enforcement and military purposes differs. "Military rules are designed to meet the primary purpose of the engagement, usually to defeat the enemy. Police rules, on the other hand, have as their primary object resolution of an incident without loss of life if possible and without harm to participants [including the criminal] or bystanders."[39] Does it make sense to take the policeman's approach and attempt to arrest politically dedicated and ideologically motivated terrorists who possess substantial firepower and destructive capability?

If the military is called in to assist law enforcement authorities, whose rules are used—police or military? If military force must be used to assist in the arrest, then do terrorists achieve some degree of legitimacy? Some commentators believe so:

> If crack units are necessary for operations against them, that confers a special status upon the terrorists. If they can only be mastered by army units, surely that means that terrorist bands are in fact military units themselves.[40]

Imprisoning Terrorists

The problem of treating terrorists as ordinary criminals does not end with arrest; it begins there. Politicized trials are a tactic of terrorists.[41] And once convicted, terrorists enter a prison system that is ill prepared to deal with them; punishment, incapacitation, and rehabilitation do not fit the terrorist well.

Psychologist Alan F. Sewell has distinguished three types of criminals. They are:

1. The psychopathological offender whose inconsistent behavior reflects idiosyncratic values. To the extent that political crime represents opposition of social value systems, this offender's behavior cannot be politically motivated.
2. The common criminal whose behavior is inconsistent but does not imply values in conflict with those of his society. This offender's deviation from social values is in the realm of means,

not ends. Hence, this offender's behavior also cannot be politically motivated.

3. Ideologically motivated offenders are the true political criminals. Their behavior demonstrates a consistent opposition of the values of the society in which the offense is committed. Their motivation is indeed to harm the political system of one society in furtherance of the cause of the political system of another society.[42]

How does one punish a terrorist who does not accept the system or moral responsibility for offenses committed? How does one apply a parole system, based as it is upon the offender's readiness to reenter society, if rehabilitation does not occur? Indeed, the only function served by jailing terrorists may be to incapacitate them.[43]

While imprisoned, the terrorist presents further unique problems. The recruiting of others from the prison population to become terrorists is a serious problem. Studies show that the Symbionese Liberation Army (SLA) was born in California's Vacaville prison. Likewise Black Muslims were recruited in the prisons of Washington, D.C. And Ulrike Meinhof, as a columnist for the Hamburg magazine *Konkret*, visited with Andreas Baader while he was in prison, planned and effected Baader's escape, and formed what became known as the Baader-Meinhof gang and, subsequently, the German Red Army faction.[44]

Use of Force Abroad: In What Context?

Our analysis of the law enforcement approach thus far has focused on efforts at international cooperation and the appropriateness of treating terrorists as ordinary criminals. To the extent that we have discussed the use of force it has been as a function of the arrest process. Now we turn to the issue of the use of force not as a function of arrest but as an end in itself, namely, to deter or remove a terrorist threat abroad. It is in this response mode that the law enforcement approach is weakest, for it seeks to emphasize the criminal character of terrorism and to

de-emphasize its combatant character. When projection of military force overseas becomes necessary, how does the law enforcement approach conceptualize the response?

Traditional international law governing the use or threatened use of military force abroad accepts only three possibilities: response to a peacetime crisis, armed conflict, or war. These choices span the conflict spectrum and each has its own body of international law: law of peacetime response, law of armed conflict, and law of war.

Confronted with a set of factual circumstances, states must choose the context of their response.[45] Terrorism is not peculiar to a definable area of the conflict spectrum; it is an unacceptable method of applying violence that can range across the spectrum from the high to the low end. Consequently, states responding to terrorism have latitude to characterize their response within the conflict spectrum as they deem appropriate to the threat. But, the law enforcement approach leaves no choice. The only context in which the use of military force abroad may be employed is in the context of a peacetime crisis. Why? Because contemporary international law no longer recognizes war as a choice[46] and the armed conflict context is precisely the choice that the law enforcement approach refuses to make. The only remaining choice is a peacetime crisis response.

Peacetime Crisis Response: What Does It Mean?

First, a state using or threatening the use of military force to respond to a peacetime crisis intends that its actions be viewed as occurring in a peacetime context. The acting state is not declaring war nor does it wish its actions viewed as creating a situation of armed conflict. A state can achieve this characterization of its action only if other involved states likewise agree, tacitly or otherwise.[47] Should any state involved in the crisis opt to consider the unfolding events as armed conflict, others will find it difficult to deny this assessment. Generally, during the past four decades, states have approached situations of tension within the context of a peacetime response. By stressing military action within a

peacetime context, the risk of escalation may be reduced. In this sense, the law enforcement approach may have an advantage over the law of armed conflict approach.

Second, the rules of international law differ depending on whether force is employed in a peacetime crisis or during armed conflict. Use or threatened use of force requires two levels of decisionmaking: the initial decision to use force and subsequent decisions on the level of force to be used. Different bodies of international law exist relevant to each decision. The first addresses the question of whether use per se is legitimate; the second addresses the manner and mode of use, for example, targets, weapons, and status and treatment of individuals caught up in the event. To understand what it means in international law to elect a peacetime crisis response instead of an armed conflict response, a brief look at each is necessary.

Initial Decision to Use or Threaten Use of Force

The international law rules governing the legitimacy of a state's right to use or threaten the use of military force abroad are the same whether in a peacetime crisis or in an armed conflict situation. Those rules, contained chiefly in customary international law and the United Nations Charter, are discussed in detail in chapters 4–6. However, satisfying the conditions or requirements of those rules will prove more difficult in a peacetime context. How much easier is it for a state to assert persuasively, for example, that it is responding in self-defense to an armed attack if the situation is characterized as an armed conflict rather than a peacetime crisis? The law recognizes that "a nation, of course, possesses a much broader right to invoke coercive measures against any opposing belligerent [and that] the right to use force in time of peace is very limited."[48]

Subsequent Decisions on Conduct of Operations

In international law, the law of armed conflict regulates how force is to be employed *during* operations but it does not specify

the rules for making the initial decision to use or threaten the use of force. Many of the rules contained in the law of armed conflict apply in peacetime—such as the requirements to minimize collateral civilian damage and injury and target only military objectives, and the obligation to treat all parties humanely.[49] But many of the rules of the law of armed conflict do not apply when resort to force occurs in a peacetime context because those rules are triggered only in situations of declaration of war or armed conflict—situations that the peacetime crisis response is designed to avoid.

The neutrality rules, for example, are inapplicable. These detailed and demanding rules set *the standard of conduct for third-party states not involved in the conflict.* They concern responsibilities toward participants in the conflict including economic relations, such as trade.[50] Also inapplicable are the 1949 Geneva conventions. Common article 2 provides that "the present Convention shall apply to all cases of *declared war or of any other armed conflict* which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them" (emphasis added).[51] Since the Geneva conventions do not apply in peacetime, the provisions of the conventions outlawing terrorist acts and providing for grave breaches, prosecution, and extradition are not pertinent. The law enforcement approach forfeits these benefits.

Moreover, the provisions regarding prisoner of war status in Geneva Convention III do not apply in peacetime either. The law enforcement approach entirely ignores the issue of whether terrorists would be entitled to POW status. Clearly, if the issue were considered, terrorists would not be entitled to POW status because they would be viewed as unlawful or unprivileged combatants.

On the other hand, inapplicability of the Geneva conventions raises a serious problem for states using military force in a peacetime context. Are US soldiers sent into combat in peacetime covered by the conventions? They are not, and ways must be found around this problem. One solution is for all involved parties simply to apply the conventions. Another solution, with the least risk to military personnel, is to ensure that none are captured. This was a key requirement, for example, in planning the April 1986 Libya

raid. Planning for "no losses" to avoid the issue of the status of captured personnel has been an important consideration in counterterrorist actions.

Law of Armed Conflict: An Alternate Approach?

Robert Frost lamented in his poem *The Road Not Taken* that "two roads diverged in a yellow wood, And sorry I could not travel both." The law of armed conflict approach is the road not taken. This body of customary and treaty law includes the 1907 Hague Regulations, the 1925 Geneva Gas Protocol, and the 1949 Geneva conventions, all of which apply in time of armed conflict. By approaching state-sponsored or -supported international terrorism in the context of armed conflict, the United States would be recognizing terrorism as a mode of warfare. Adopting the law of armed conflict approach might also serve to emphasize the seriousness of the threat to US national security.

A policy decision opting for this approach would, however, admit to a higher level of violence. The law of armed conflict was never intended to apply to individual criminal acts, sporadic uprisings, riots, or minor civil disorders.[52] Acknowledging the existence of a state of armed conflict may be an unacceptable foreign policy admission. Admission of a higher level of violence, however, may escalate the situation, which could be a prime argument against this approach.

Ironically, the law of armed conflict approach provides a more effective criminal system for dealing with international terrorists than does the law enforcement approach. The law of armed conflict makes terrorism an international crime and establishes a universal obligation on the part of all nations to prosecute or extradite those engaging in terrorist conduct. The law of armed conflict does not grant terrorists POW status. Instead it condemns them as unlawful combatants on six counts.

Terrorism as Criminal Conduct

The law of armed conflict absolutely and unconditionally bans terrorism irrespective of the justness of the terrorist's cause. It is law universally accepted by the international community.[53] Article 22, Hague Regulations, provides that "the right of belligerents to adopt means of injuring the enemy is not unlimited."[54] Fundamental to the law of armed conflict is maintaining the distinction between combatants and noncombatants.[55] It forbids making civilians the *direct object* of attack, although it is recognized that in armed conflict incidental damage or injury to civilians might occur.[56] What is unique about terrorism is its direct targeting of civilians. "Terrorists may attack military and internal security forces but the essence of their strategy is to attack what would normally be considered non-combatant and non-military targets by means violative of the minimal requirements of the law of war. . . . They wage countervalue rather than counterforce war."[57]

Civilians and civilian objects are specifically protected by Geneva Convention IV,[58] which provides in article 33 that "*all* measures of intimidation or of terrorism are prohibited" (emphasis added) against them.[59] This ban includes collective punishment, which is a form of terrorizing the civilian population.[60] Article 27, Geneva Convention IV, requires that all civilians be treated h[illegible]nely.[61] Thus, against civilians and civilian objects, concludes Hans-Peter Glasser, legal adviser to the directorate of the International Committee of the Red Cross (ICRC), "no terrorist act can ever be justified."[62] This convention strictly forbids terrorist acts not only against diplomats, women, children, tourists, businessmen, and ordinary citizens in their daily pursuits, but also those against embassies and consulates; commercial aircraft, ships, trains, and buses; hospitals; and like institutions. In short, civilians and civilian objects are not lawful targets.[63]

Moreover, the law of armed conflict prohibits the taking of civilian hostages.[64] While nations exert great effort to bring into force such law enforcement measures as the 1979 International Convention Against Taking of Hostages and to obtain universal acceptance of it, such a rule already exists in the law of armed conflict.[65] Pillage of civilian property also is forbidden.[66]

The law of armed conflict provides a standard of treatment for prisoners. Geneva Conventions I, II, and III require respect for POWs.[67] Killing prisoners, a frequent terrorist act, is prohibited. As Glasser notes, "any attempts upon their lives, or violence to their persons, are strictly forbidden. . . . Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind."[68] He concludes that "these provisions are tantamount to a comprehensive ban on acts of terrorism against overpowered enemies."[69]

Additionally, the law of armed conflict forbids the use of weapons, projectiles, and materials calculated to cause unnecessary suffering.[70] The 1868 Saint Petersburg Convention prohibits the use of projectiles of less than 400 grams and having certain characteristics.[71] Dumdum and exploding projectiles are forbidden.[72] The 1925 Geneva Gas Protocol prohibits gas and biological warfare.[73] Article 23(a) of the Hague Regulations provides: "It is especially forbidden: (a) To employ poison or poisoned weapons."[74] The 1979 poisoning of Israeli oranges with mercury injection by Palestinian extremists, if occurring within armed conflict, would have violated the law of armed conflict, as would the 1982 poisoning of Tylenol capsules with cyanide that killed six persons if the act had been done by terrorists in an armed conflict environment. In the latter instance, no one claimed responsibility and no one was arrested; it could have been the act of a common criminal.

The law of armed conflict not only prohibits unlawful weapons, it prohibits unlawful use of a lawful weapon as well. Air Force Pamphlet (AFP) 110–31, *International Law—The Conduct of Armed Conflict and Air Operations*, makes this distinction clear.

> A weapon may be illegal *per se* if either international custom or treaty has forbidden its use under all circumstances. An example is poison to kill or injure a person. On the other hand, any weapon may be used unlawfully, such as when it is directed against civilians and not at a military objective. In the first example, the question of how the weapon is used is irrelevant because the use of the weapon itself is prohibited; in the second example, the manner of employment is critical.[75]

In accordance with the law of armed conflict, the use of any weapon against a civilian or civilian object by a terrorist would be unlawful.

The law of armed conflict makes military objectives lawful targets while civilians and civilian objects are prohibited targets. Military objects would include, for example, military installations, military personnel, and the industrial base supporting the war-fighting capability. One might well ask, if the law of armed conflict approach were adopted, then would not terrorist attacks against these military targets be lawful? The answer to this question would be in the affirmative *if* terrorists could qualify as lawful combatants, but they cannot.

Terrorists as Unlawful Combatants

Terrorists are unprivileged or unlawful combatants and as such are not entitled to treatment as POWs. They do not meet the conditions for lawful combatant status as provided in article 4, Geneva Convention III.[76] One condition is that those engaging in use of force belong to organizations that act on behalf of an entity subject to international law. Thus, state-sponsored international terrorists might meet this condition. So too might factions of the PLO, which may have an international status. But those terrorists without such a link cannot be lawful combatants.[77] Those terrorists fail to meet another condition of the Geneva conventions: that lawful combatants conduct their operations in accordance with the laws and customs of war. All terrorists are disqualified on this ground. The terrorist resolve to attack civilians is directly counter to the letter and spirit of the law of armed conflict, which seeks as one of its primary purposes to protect those persons. Furthermore, an individual member of a terrorist organization who attacks only military objectives will not receive lawful combatant status any more than would a group of terrorists captured on a particular mission directed at a true military objective. Dr Jiri Toman, deputy director of the Henri Dunant Institute (a research organ of the ICRC), tells why.

> These conditions concern the movement as a whole and individual violations of these rules [do] not deprive its members of their protection. Those

> who violate these principles are responsible for this violence. On the contrary, if the movement itself does not respect these conditions, any member of this movement, even if he personally respects the rules, does not receive the benefits of privileged treatment.
>
> . . . the fundamental principles of the law of war exclude the terrorist activities. This prohibition is based on the lack of distinction between legitimate and illegitimate attacks.[78]

Since terrorists are unlawful combatants, they cannot receive the privilege of POW treatment and consequently are also "unprivileged combatants."[79] Terrorists and their supporters who argue for application of the Geneva conventions to terrorist activity do not understand what that would mean. They "have been quick to assert the protective features of the law of war vis-à-vis insurgent combatants but have virtually ignored the duties of such combatants to fight according to the rules of war."[80]

To be protected by the Geneva conventions, terrorists would have to change their methods fundamentally. They would have to cease to be terrorists and comply with the law of armed conflict. And, even if they did so, POW status would not prevent them from being "interned for the duration of the conflict;" that is, for an indefinite period.[81] Since they are not likely to change their methods, applying the Geneva conventions to their conduct would simply subject them to criminal prosecution and punishment for violation of the law applicable in armed conflict. Joseph Lador-Lederer summed it up very well when he wrote: "War cannot invest terrorism with any legality, nor can it divest terrorism of criminality."[82] Terrorists will not benefit from this legal regime.

Duty to Prosecute or Extradite

In contrast to the law enforcement approach, which seeks international cooperation to criminalize terrorism and to improve extradition procedures, the law of armed conflict treats terrorist attacks as serious criminal acts and includes a universal obligation for states to prosecute or extradite. Moreover, the law of armed conflict characterizes terrorist acts as war crimes, crimes against humanity, and grave breaches of the Geneva conventions.

The Nuremberg Charter, article 6(b), defines war crimes as including

> murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.[83]

Article 6(c) defines crimes against humanity as including "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population." On 11 December 1946 the UN General Assembly passed Resolution 95(1) unanimously ratifying the Nuremberg Charter and Judgment. Since then the Nuremberg principles have become customary international law establishing individual criminal responsibility.

The Geneva conventions provide for grave breaches giving rise to individual criminal responsibility to include, for example, the following acts against civilians: willful killing, torture or inhumane treatment, willfully causing great suffering or serious injury to body or health, unlawful confinement, and taking of hostages.[84] The Geneva conventions not only establish individual criminal responsibility for terrorist acts, but they create a *universal* obligation on the part of states to enact the necessary domestic criminal laws to ensure effective implementation of these criminal provisions of international law and to effect searches for and prosecution or extradition of offenders.[85] As a general rule individuals are not subjects of international law; international law concerns relations among states. However, individuals can become subject to international law when they commit international crimes, such as war crimes, crimes against humanity, and grave breaches of the Geneva conventions. Nevertheless, in these instances such persons normally are not tried by an international court; the primary obligation to try rests with states. The United States, for example, has enacted legislation to prosecute such persons.[86] Also, it should be noted that there is no statute of limitations on such crimes.[87]

Terrorist's Cause Not Legitimated

The application of the law of armed conflict to international terrorists legitimizes neither their methods nor their causes.[88] Within the context of the law of armed conflict, the distinction between terrorist and freedom fighter or guerrilla is plain. The law of armed conflict is blind to causes but is ever mindful of the means employed. The terrorist's general purpose is to direct violence against civilians and civilian objects; the guerrilla or freedom fighter's general purpose is to direct violence at military objectives. Or put another way, terrorist attacks on military objectives are the exception not the rule; guerrilla attacks on military objectives are the rule not the exception. Benjamin Netanyahu, Israel's ambassador to the United Nations, summed it up precisely when he wrote:

> Terrorists habitually describe themselves as "guerrillas" but guerrillas are not terrorists. They [guerrillas] are irregular soldiers who wage war on regular *military* forces. Terrorists choose to attack weak and defenseless civilians: old men, women and children—anyone in fact except soldiers if terrorists can avoid it.
>
> This indeed is one of terrorism's most pernicious effects; it blurs the distinction between combatants and noncombatants, the central tenet of the laws of war.[89]

Terrorism as a Military Responsibility

Developing doctrine, strategy, tactics, and rules of engagement on combating terrorism may be assisted by treating international terrorism within the framework of the law of armed conflict. As former secretary of the Air Force Verne Orr admonished in 1985,

> [A] challenge to [our military leadership is] to make sure doctrine keeps pace with the evolving threat. We need only go back in history to illustrate that we must never again prepare to fight "the last war." Future warfare may not exist in the traditional sense. It may be nothing more than well-organized and coordinated terrorism, perpetrated by highly dedicated and heavily armed terrorists on a mass scale.[90]

Doctrine has not kept pace with the terrorist threat. According to the "USAF Anti-Terrorism Task Group Final Report,"

1 January 1984, "the Air Force has not developed doctrine to combat terrorism because doctrine focuses on conflict and terrorism has been treated as a criminal activity."[91] The report also finds similar deficiencies in rules of engagement (ROE):

> Personnel do not tend to think of ROE relative to terrorism. Terrorism consists of criminal activity and is currently addressed in terms of law enforcement and self-defense, most notably centering on the use of deadly force. . . . The question arises whether we want to create a separate body of rules for dealing with terrorism or merely insure that the terrorist threat is adequately addressed in existing regulations and plans which are, in effect, the ROE for dealing with terrorist and other criminal acts.[92]

The task group recommended in favor of the second option without considering the possibilities inherent in the law of armed conflict approach.

This lack of doctrine and an accompanying confusion over rules of engagement are not helpful. Uncertainty about how and when military force will be used against international terrorism is dangerous and should be troublesome to national leaders. Shifting from a law enforcement approach to a law of armed conflict approach with emphasis on terrorism as a mode of warfare could contribute to clearer thinking about the military role and mission. Even if this shift were not to occur, an understanding of the two legal approaches described in this chapter could put international terrorism in clear focus. It is disturbing, therefore, to read the August 1986 joint study on low-intensity conflict sponsored by the US Army Training and Doctrine Command and find nothing in it on the legal aspects of the either low-intensity conflict or its subelement, international terrorism.[93]

Ancillary Issues

Finally, applying the law of armed conflict to international terrorist activities could result in some collateral legal problems. Thus, the full effect of such an approach would require further study. For example, all-risk insurance policies (both life and property) usually contain a clause excluding coverage in time of "war . . . civil war, revolution, rebellion, insurrection, or warlike operations, whether there be a declaration of war or not." For the law

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of armed conflict to apply, a state of armed conflict must be recognized. Would insurance coverage cease?[94]

Another issue is the choice and use of weapons, not by the terrorists but by states opposing terrorists. For example, in time of armed conflict dumdum bullets are prohibited. In time of peace, they are not. Most nations use dumdum-like ammunition in terrorist situations, not to inflict unnecessary suffering on the terrorist but to contain the hostile situation. Dumdum rounds have a greater tendency not to pass through the body of the person shot, thus reducing likelihood of incidental injury to others. In aircraft hijacking situations, the rounds are less likely to pierce the hull of the aircraft, thereby causing depressurization.[95]

Summary and Transition

This chapter has outlined two different approaches to state-sponsored international terrorism. The West, including the United States, has elected to respond to terrorism through the law enforcement approach rather than to invoke the law of armed conflict. Both approaches have advantages and disadvantages. The choice is not clear cut. Table 2 compares the two approaches.

TABLE 2

Alternate Legal Approaches Compared

Trait	*Law Enforcement*	*Law of Armed Conflict*
Basic thrust	Civil	Military
Primary level of responsibility	Police	Armed forces
View of terrorist activity	Outlaw	Unlawful combat
Combatant status of terrorists	None	Unlawful and unprivileged
Treatment of terrorists	Criminal	Criminal
Objective of authorities	Arrest, prosecute, and imprison	Defeat, prosecute, and imprison
Offenses, where normally defined	Domestic law	International law

Trait	*Law Enforcement*	*Law of Armed Conflict*
Applicability of treaty law defining offenses	Limited	Universal
Applicability of extradition law	Limited	Universal
Authority to try	Domestic courts	Normally domestic, but international courts could
Context of armed force response	Peacetime crisis	Armed conflict
Initial decision to use force (go/no-go rules)	(Rules contained in chapters 4-6 are the same for both approaches. May be easier for LOAC approach to meet the conditions of the rules.)	
Subsequent decisions on use of force (rules governing conduct of military operation)	Some law of armed conflict rules apply. Geneva conventions do not apply.	All law of armed conflict rules apply including Geneva conventions.

Further review and discussion is encouraged so that the West can best utilize international law in combating terrorism. The next chapter lays the foundation for the legitimate use of armed force abroad by looking at the international law concept of state responsibility.

NOTES

1. Department of State, "Libyan Sanctions," President Ronald Reagan, opening statement at news conference, 7 January 1986, Current Policy 780, 1.

2. Brian Michael Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984, 7.

3. Paul Wilkinson, *Terrorism and the Liberal State* (New York: John Wiley & Sons, Halstead Press, 1977), 179; Richard D. Crabtree, "U.S. Policy for Countering Terrorism: The Intelligence Dimension," *Conflict* 6, no. 1 (Winter 1986): 5; and Fred Kaplan, "New Tactics? Administration Pushing Revival of Units to Fight Small-Scale Wars," *Boston Globe*, 10 July 1986, 1.

4. Neil C. Livingstone and Terrell E. Arnold write: "Today international terrorists and their patrons are, in effect, at war with the United States." Liv-

ingstone and Arnold, "Democracy under Attack," in *Fighting Back: Winning the War against Terrorism*, ed. Livingstone and Arnold (Lexington, Mass.: D. C. Heath and Co., 1986), 1. Donald M. Kerr of the Los Alamos National Laboratory finds that "increasingly, terrorism has become a form of low-intensity warfare." Kerr, "Coping with Terrorism," *Terrorism: An International Journal* 8, no. 2 (1985): 115. Stefan T. Possony, senior fellow at the Hoover Institution avoids reference to the word war when he states in testimony before the US Senate that "in paraphrase of Clausewitz it could be said that terrorism is the continuation of [a] political feud with other means. It is, therefore, wise to regard terrorism, whatever the character of particular operations or campaigns, as military enterprises." Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Hearings on Historical Antecedents of Soviet Terrorism*, 97th Cong., 1st sess., 11–12 June 1981, series J-97-40, 32–33.

5. Jeane J. Kirkpatrick quoted in Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Report on "State-Sponsored Terrorism,"* 99th Cong., 1st sess., June 1985, Senate print 99-56, 37.

6. Vernon Walters quoted in "US Exercises Right of Self-Defense against Libyan Terrorism," *Department of State Bulletin* 86, no. 2111 (June 1986): 21.

7. George Shultz quoted by Crabtree, 5.

8. Department of Defense, *Report of the Department of Defense Commission on Beirut International Airport Terrorist Act* (Washington, D.C.: 23 October 1983), 4.

9. Department of State, "Terrorism: Overview and Developments," address by Ambassador Robert B. Oakley, director, Office of Counter-terrorism and Emergency Planning, before the Issues Management Association, Chicago, Ill., 13 September 1985, Current Policy 744, 5.

10. Joint Chiefs of Staff definition quoted in Department of the Army, Training and Doctrine Command, *Joint Low-Intensity Conflict Project*, vol. 1, *Analytical Review of Low-Intensity Conflict* (Fort Monroe, Va.: 1 August 1986), 1–2.

11. Quoted by Albert L. Weeks, in "Terrorism, With Moscow's Backing, Aiming Increasingly at U.S. Targets," *New York City Tribune*, 15 May 1986, 1.

12. Louis G. Fields, Jr., "The Third Annual Waldemar A. Solf Lecture in International Law: Contemporary Terrorism and the Rule of Law," *Military Law Review*, no. 113 (Summer 1986): 11. Christopher Dobson and Ronald Payne wrote: "The general aim was to make terrorism a crime, and to consider terrorists as criminals." Dobson and Payne, *Counterattack: The West's Battle against the Terrorists* (New York: Facts on File, 1982), 16. The US Army asserts that "United States policy on terrorism is clear: All terrorists are criminals." See Department of the Army, "DoD Policy on Terrorism," *Speaking with One Voice*, 15 September 1982, 1.

13. Lt Col James P. Terry, USMC, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May–June 1986): 67. See also John T. Correll, editorial, "Terrorism and Military Force," *Air Force Magazine* 69, no. 9 (September 1986): 8; Capt William H. Burgess III, USA, "Countering Global Terrorism," *Military Review* 66, no. 6 (June 1986): 74; Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 51; Jay Mallin, "Terrorism as a Military Weapon," in *Contemporary Terrorism: Selected Readings*, ed. John D. Elliott and Leslie K. Gibson (Gaithersburg, Md.: International Association of Chiefs of Police, 1978), 119–20; Eugene Rostow, "Overcoming Denial," in *Terrorism: How the West Can Win*, ed. Benjamin Netanyahu (New York: Farrar, Straus, and Giroux for the Jonathan Institute, 1986), 146–47; and Maj Jeffery W. Wright, USA, "Terrorism: A Mode of Warfare," *Military Review* 64, no. 10 (October 1984): 43.

14. Stephen Sloan, *Beating International Terrorism: An Action Strategy for Preemption and Punishment* (Maxwell AFB, Ala.: Air University Press, December 1986), xii.

15. Vice President, *Public Report of the Vice President's Task Force on Combatting Terrorism* (Washington, D.C.: February 1986), 1.

16. Rostow, 146.

17. Abraham D. Sofaer, "Terrorism and the Law," *Foreign Affairs* 64, no. 5 (Summer 1986): 901.

18. Ibid., 912.

19. Noel C. Koch, "Airlines on the Front Lines," *Wall Street Journal*, 12 September 1986, 32.

20. Sloan, 3.

21. Harry G. Summers, Jr., "Anti-Terrorism Game Plan," book review, *Washington Times*, 20 May 1986, 1(D).

22. Caspar Weinberger, Department of Defense, Office of the Assistant Secretary (Public Affairs), News Release 609-84, 28 November 1984.

23. George Shultz, quoted in *Joint Project, Executive Summary*, 1.

24. To the extent that public officials and the press fail to label as terrorist acts criminal offenses such as murder, kidnapping, arson, assault, or extortion and use instead other language implying a noncriminal event, they undermine the goal of identifying terrorism with criminal conduct.

25. See Charles Maechling, Jr., "Containing Terrorism," *Foreign Service Journal* 61, no. 7 (July–August 1984), 34; and J. W. Schneider quoted in International Law Association (ILA), "International Terrorism: Third Interim Report of the Committee," in *Report of the Fifty-Ninth Conference Held at Belgrade* (Great Britain: 1982), 515.

26. Maechling, 34.

27. Kay Hailbronner, "International Terrorism and the Laws of War," in *German Year Book of International Law* 25 (Berlin: Duncker & Humblot, 1982), 175.

28. Paul A. Tharp, Jr., "The Laws of War as a Potential Legal Regime for the Control of Terrorist Activities," *Journal of International Affairs* 32, no. 1 (1978): 98.

29. "European Convention on the Suppression of Terrorism," 27 January 1977, European Treaty Series 90; and Abraham Sofaer's discussion of the Supplementary Treaty Concerning the Extradition Treaty between the Government of the United States and the Government of the United Kingdom of Great Britain and Northern Ireland, signed 25 June 1985, in "The Political Offense Exception and Terrorism," statement before Senate Foreign Relations Committee, 1 August 1985, Department of State, Current Policy 762.

30. *Eain v. Wilkes*, 641 F. 2d 504 (1981).

31. "Convention for the Prevention and Punishment of Terrorism," opened for signature at Geneva, 16 November 1937, League of Nations, C.94.M.47.1938.V.

32. See Sofaer, "Terrorism and the Law," 903.

33. Jiri Toman, "Terrorism and the Regulation of Armed Conflict," in *International Terrorism and Political Crimes*, ed. M. Cherif Bassiouni, 3d Conference on Terrorism and Political Crimes, 1973 (Springfield, Ill.: Charles C. Thomas for International Institute for Advanced Criminal Sciences, 1975), 152. See also John Norton Moore, "International Law and Terrorism," *ROA National Security Report* 4, no. 10 (October 1986): 12; and statement of Monroe Leigh, Department of State legal adviser, in UN Sixth (Legal) Committee, 6 December 1976, as quoted in Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law*, 1976 (Washington, D.C.: 1977), 157.

34. ILA, "Third Interim Report," 354. See also Alfred P. Rubin, "Current Legal Approaches to International Terrorism," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 437–38.

35. See ILA, "Terrorism: Final Committee Report," *Report of the Sixty-First Conference Held at Paris* (Great Britain: 1985), 320–22.

36. Department of State, "Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation" (Montreal Convention), 23 September 1971, *Treaties and Other International Acts Series* (TIAS) 7570, *United States Treaties and Other International Agreements* (UST), vol. 24, pt. 1, 564; "Convention for the Suppression of Unlawful Seizure of Aircraft" (Hague Convention), 16 December 1970, TIAS 7192, UST, vol. 22, pt. 2, 1641; "Convention on Offenses and Certain Other Acts Committed on Board Aircraft" (Tokyo Convention), 14 September 1963, TIAS 6768, UST, vol. 20, pt. 3, 2941; United Nations Treaty Series (UNTS), *Treaties and International Agreements Registered or Filed and Reported with the Secretariat of the United*

Nations, vol. 704 (1969), no. 10106, 219; "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents" (New York Convention), 14 December 1973, TIAS 8532, UST, vol. 28, pt. 2, 1955; and United Nations, "International Convention against Taking of Hostages," 17 December 1979, A/34/319 (1979).

37. For example, the International Convention against Taking of Hostages is not yet in force, having failed to receive the minimum 22 necessary ratifications. During the debate in the UN Sixth (Legal) Committee, the Libyan representative proposed that the text of the convention be limited to "innocent" hostages. The US representative Robert Rosenstock replied:

> By its nature, the taking of hostages entails the seizure of an individual, the deprivation of his liberty, and a threat to his life, coupled with an ultimatum that some third party comply with the demands of the perpetrators. It always involves demands on a third party. The person or persons held are not held for reasons relating to themselves but to the demands on a third party; they are thus by definition innocent in the context of the act in question . . . hostages are human beings held for what ransom they may bring. Held for what ransom they may bring, not for them or their acts. It would be at the least redundant and at most dangerously confusing to add an inherently irrelevant adjectival qualifier to the term hostage.

Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1976*, ed. Eleanor C. McDowell (Washington, D.C.: 1977), 158–59, State Department, 8908.

38. Kerr, 122.

39. Terrell E. Arnold, "Rewriting the Rules of Engagement," in *Fighting Back*, ed. Livingstone and Arnold, 188. See also Dobson and Payne, 186; Gayle Rivers, *The War against the Terrorists: How to Win It* (New York: Stein and Day, 1986), 36–37 and 210; and Paul Wilkinson, ed., *Political Terrorism* (London: Macmillan Co., 1974), 150.

40. Dobson and Payne, 186. See also Bart de Schutter and Christine van de Wyngaert, "Coping with Non-International Armed Conflicts: The Borderline between National and International Law," *Georgia Journal of International and Comparative Law* 13, supp. (1983): 280; and *British Perspectives on Terrorism*, ed. Paul Wilkinson (London: George Allen & Unwin, 1981), 17–71.

41. See Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin's Press, 1985), 142–43.

42. Alan F. Sewell, "Political Crime: A Psychologist's Perspective," in Bassiouni, 20–21.

43. See Ronald D. Crelinsten, Danielle Laberge-Altmejd, and Denis Szabo, *Terrorism and Criminal Justice: An International Perspective* (Lexington, Mass.: D. C. Heath and Co., 1978), 35–38; and Senate, Committee on Foreign Relations, *Hearings before the Committee on Foreign Relations, S.2236*, "Legal Aspects of International Terrorism: The Trees and the Forest," by Alona E. Evans and John F. Murphy, 95th Cong., 2d sess., 8 June 1978, 91.

44. See John B. Wolf, *Fear of Fear: A Survey of Terrorist Operations and Controls in Open Societies* (New York: Plenum Press, 1981), 60–65.

45. See ILA, "Third Interim Report," 352; Tom J. Farer, "Law and War," in *The Future of the International Legal Order*, ed. Cyril E. Black and Richard A. Falk, vol. 3, *Conflict Management* (Princeton, N.J.: Princeton University Press, Center for International Studies, 1971), 15.

46. See Farer, 17; Lt Comdr Bruce Harlow, USN, "The Legal Use of Force . . . Short of War," US Naval Institute, *Proceedings* 92, no. 11 (November 1966): 89; and Jeffrey A. Sheehan, "The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force," *Fletcher Forum* 1 (Spring 1977): 135. In 1880 international jurist William E. Hall could write: "International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up, if they choose, and to busy itself only in regulating the effects of the relation." Quoted by J. L. Brierly, *The Law of Nations*, 6th ed., ed. Sir Humphrey Waldock (New York: Oxford University Press, 1963), 398. Since 1919 a process has been under way that has resulted in the elimination of the right of states to go to war. See Max Sorensen, *Manual of Public International Law* (New York: St. Martin's Press, 1968), 742.

Although states did not agree in the Covenant of the League of Nations to renounce war, they did agree to a procedure to regulate resorting to it. Members affirmed that they would not resort to war until three months after an award by arbitrators, a judicial decision, or a report of the Council had been ordered (article 12). Resort to war was forbidden against any state that had complied with such arbitral award or judicial decision (article 13), or, if unanimously agreed to by those Council members not a party to the dispute, any state which complied with the recommendation of the report of the Council (article 15). See Rosalyn Higgins, "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice," in *British Year Book of International Law, 1961*, vol. 37 (Oxford, England: Oxford University Press for Royal Institute for International Affairs, 1962), 272.

In 1928 the Pact of Paris, otherwise known as the Kellogg-Briand Pact, was ratified. In this agreement the high contracting parties, as they were called, agreed to condemn recourse to war as a solution for international disputes and to renounce war as an instrument of foreign policy. See Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 12, ed. Marjorie M. Whiteman (Washington, D.C.: August 1971), 3, State Department, 8586. The ban on declaring war was reaffirmed at the San Francisco Conference in 1945. "When the United Nations (UN) Charter was adopted," writes Oscar Schachter, Hamilton Fish Professor of International Law and Diplomacy at Columbia University, "it was generally considered to have outlawed war." Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April–May 1984): 1620.

47. See William W. Bishop, Jr., *International Law: Cases and Materials*, 2d ed. (Boston: Little, Brown and Co., 1962), 744; and Neil C. Livingstone and Terrell E. Arnold, "The Rise of State-Sponsored Terrorism," in *Fighting Back*, ed. Livingstone and Arnold, 23.

48. Harlow, 97-98.

49. See generally Field Manual (FM) 27-10, *The Law of Land Warfare*; Naval Warfare Information Publication (NWIP) 10-2, *Law of Naval Warfare*; and Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*. See also "Geneva Convention Relative to the Treatment of Prisoners of War" (Geneva Convention III), 12 August 1949, TIAS 3364, UST, vol. 6, pt. 3, article 3, 3316; UNTS, vol. 75 (1950), no. 972, 135.

50. See "Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land" (Hague Convention IV), 18 October 1907, *Statutes at Large*, vol. 36, sec. 2310; United States Treaty Series (TS) 540; *United States Treaties and Other International Agreements, 1776–1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 1, Multilateral, 1776-1917, 654.

51. "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field" (Geneva Convention I), 12 August 1949, TIAS 3362, UST, vol. 6, pt. 3, common article 2, 3114; UNTS, vol. 75 (1950), no. 970, 31; "Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea" (Geneva Convention II), 12 August 1949, TIAS 3363, UST, vol. 6, pt. 3, 3217; UNTS, vol. 75 (1950), no. 971, 85; Geneva Convention III; and "Geneva Convention Relative to the Protection of Civilian Persons in Time of War" (Geneva Convention IV), 11 August 1949, TIAS 3365, UST, vol. 6, pt. 3, 3516; UNTS, vol. 75 (1950), no. 973, 287.

52. See Gilliam White in "International Terrorism," in ILA, *Report of the Fifty-Seventh Conference Held at Madrid* (Great Britain: 1978), 127.

53. See AFP 110-31, para. 1-2d; Hans-Peter Glasser, "Prohibition of Terrorist Acts in International Humanitarian Law," *International Review of the Red Cross*, no. 253 (July-August 1986): 200; Jordan J. Paust, "'Nonprotected' Persons or Things," in *Legal Aspects of International Terrorism*, ed. Alona Evans and John F. Murphy (Lexington, Mass.: Lexington Books for American Society of International Law, 1978), 350; and W. Hays Parks, "Mercenaries in the Law of War," in Han, 526-27.

54. Hague Regulations (HR), article 22, annexed to Hague Convention IV; see also Paust, 352; and Tharp, 98-99.

55. See AFP 110-31, para. 1-3a(2); Richard R. Baxter, "The Geneva Conventions of 1949 and Wars of National Liberation," in Bassiouni, 131; and Toman, 134.

56. See AFP 110-31, para. 1-3a(2); United Nations General Assembly, "Respect for Human Rights in Armed Conflict," 19 December 1968, Resolution 2444, 23d sess.; and Toman, 136-39.

57. William V. O'Brien, "Terrorism—What Should We Do?" in *Terrorism*, ed. Steven Anzovin, The Reference Shelf, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 155. See also Anthony C. E. Quainton, "Terrorism: Do Something! But What?" *Department of State Bulletin* 79, no. 2030 (September 1979): 60.

58. The Protocols Additional to the Geneva Conventions of 12 August 1949 (1977) are not considered in this study for two reasons. First, the United States is not a ratifying state. Second, the protocols are not significant to the issue of state-sponsored international terrorism. For a discussion of the protocols see George H. Aldrich, "New Life for the Laws of War," *American Journal of International Law* 75, no. 4 (October 1981): 764-83; Walter Pincus, "Progressive Development of the Laws of War: A Reply to the Criticisms of the 1977 Geneva Protocols," *Virginia Journal of International Law* 26, no. 3 (Spring 1986): 693-720; Richard John Erickson, "Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict," *Virginia Journal of International Law* 19, no. 3 (Spring 1979): 557-92; Douglas J. Feith, "Law in the Service of Terror—The Strange Case of the Additional Protocols," *National Interest*, no. 1 (Fall 1985): 36-47; Glasser, 200-12; L. C. Green, "The Legalization of Terrorism," chap. 8 in *Terrorism: Theory and Practice*, ed. Yonah Alexander, David Carlton, and Paul Wilkinson, Westview Special Studies in National and International Terrorism (Boulder, Colo.: Westview Press, 1979); L. C. Green, "Terrorism and Its Responses," *Terrorism: An International Journal* 8, no. 1 (1985): 33-77; Hailbronner, 169-98; Guy B. Roberts, "The New Rules for Waging War: The Case against Ratification of Additional Protocol I," *Virginia Journal of International Law* 26, no. 1 (Fall 1985): 123-70; and Sofaer, "Terrorism and the Law," 901-22.

59. Geneva Convention IV, article 33.

60. Ibid.; Paust, 354; and Toman, 138.

61. Geneva Convention IV, article 27.

62. Glasser, 206.

63. See Geneva Convention IV, article 33; and AFP 110-31, para. 1-3a(3).

64. See Geneva Convention IV, article 34.

65. See International Convention against Taking of Hostages; and Waldemar A. Solf, "Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict," *Georgia Journal of International and Comparative Law* 13, supp. (1983), 298.

66. See Geneva Convention IV, article 33, para. 2; and AFP 110-31, para. 14-4.

67. See Glasser, 205-6.

68. Ibid., 206.

69. Ibid.

70. HR, article 23(e). See also AFP 110-31, chap. 6.

71. The Saint Petersburg Convention is found at 18 Nartens III 474; *American Journal of International Law* 1, supp. (1907) 23; and Annex I, ICRC, "Report of the ICRC, Reaffirmation and Development of the Laws and Customs Applicable to Armed Conflict" (Geneva: ICRC, 1969).

72. See AFP 110-31, para. 6-3b(2).

73. "Prohibition against the Use of Asphyxiating, Poisonous or Other Gases, and Bacteriological Methods of Warfare" (Geneva Gas Protocol), 17 June 1965, TIAS 8061, UST, vol. 26, pt. 1, 571; League of Nations Treaty Series (LNTS), vol. 94:65.

74. HR, article 23(a). See also AFP 110-31, para. 6-4f.

75. AFP 110-31, para. 6-2.

76. Geneva Convention III, article 4.

77. See Hailbronner, 178.

78. Toman, 140-41. See also Aldrich, 769; Gal-Or, 148; and Solf, "International Terrorism in Armed Conflict," in Han, 472.

79. See Geneva Convention III, article 4a; AFP 110-31, para. 3-3a-c; Baxter, 121; Glasser, 203; and Toman, 143.

80. Paul A. Tharp, Jr., "The Laws of War as a Potential for the Control of Terrorist Activities," in *International Terrorism: Current Research and Future Directions*, ed. Alan D. Buckley and Daniel D. Olson (Wayne, N.J.: Avery Publishing Co., 1980), 79.

81. See Francis Anthony Boyle, *World Politics and International Law* (Durham, N.C.: Duke University Press, 1985), 105.

82. Joseph Lador-Lederer, "A Legal Approach to International Terrorism," *Israel Law Review* 9 (1974): 209.

83. "Charter of the International Military Tribunal," 8 August 1945, *Statutes at Large*, vol. 59:1544; Executive Agreements Series (EAS) 472; Bevans, vol. 3, *Multilateral, 1931-1945*, 1238; UNTS, vol. 82 (1951), no. 251, 279.

84. See Geneva Convention IV, article 147.

85. See de Schutter and van de Wyngaert, 287; Solf, "International Terrorism," 468; and Solf, "Problems," 298.

86. See *Jurisdiction of General Courts-Martial, US Code*, Title 10, sec. 818, which provides in relevant part, "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war." See also Executive Order (EO) 12473, Manual for Courts-Martial, United States, 1984, as amended by EO 12550, Amendments to the Manual for Courts-Martial, United States, 1984, Rules of Courts-Martial (R.C.M.) 201 (a)(3), R.C.M. 201 (f)(1)(B), R.C.M. 202 (b), and R.C.M. 203. See additionally *Ex Parte Quirin*, 317 US 1 (1942).

87. On 19 May 1977 the Department of State responded to a French embassy note saying, "United States Federal law contains no statute of limita-

tion on war crimes and crimes against humanity." See Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1977*, ed. John A. Boyd (Washington, D.C.: 1979), 927, State Department, 8960.

88. The issue of legitimacy is a major issue. As noted by Prof John Norton Moore, University of Virginia School of Law, "It seems to me that the struggle for legitimacy is more typically neglected with responses to terrorism. The point has been made that one thing terrorists are about is gaining recognition by law to legitimate their cause, to legitimate the kinds of attacks which they are making against democracies and against the West in general." Moore, "Law and Terrorism," 11. See also Robert A. Friedlander, comments, "Unmuzzling the Dogs of War," *Terrorism: An International Journal* 7, no. 2 (1984): 170; David M. Graham, "Terrorism: What Political Status?" *Round Table*, no. 284 (October 1981): 401–3; and Solf, "International Terrorism," 473.

89. Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 49. As President Ronald Reagan has observed, "Freedom fighters target the military forces and the organized instruments of repression keeping dictatorial regimes in power. . . . Terrorists intentionally kill or maim unarmed civilians; often women and children, often third parties who are not in any way part of dictatorial regime." President, Office of the Press Secretary, "Radio Address by the President to the Nation," 31 May 1986. See also Lynch, 9; Robert C. McFarlane, "Terrorism and the Future of Free Society," in American Bar Association, Committee on Law and National Security, *Intelligence Report* 7, no. 5 (May 1985): 5; and Robert Oakley quoted in Department of State, "International Terrorism," 1986, *Selected Documents* 24, 3. It must be recognized, however, that the law of armed conflict does not condemn incident civilian damage or loss which occurs as a result of a direct attack on a military objective as long as the rules of proportionality are observed. See AFP 110-31, para. 1-3a(2).

90. Verne Orr, "Perspectives on Leadership," *Air University Review* 36, no. 6 (September–October 1985): 53.

91. "USAF Anti-Terrorism Task Group Final Report," 1 January 1984, 7.

92. Ibid., 54. See also Arnold, 178–79.

93. See *Joint Project*, vol. 1, *Low-Intensity Conflict*, 1 August 1986.

94. See *Pan American World Airways, Inc. v. The Aetna Casualty & Surety Co.* et al., 505 F. 2d. 989 (1974); and *Borysoglebski v. Continental Insurance Co., Inc.*, US Dist. Ct., N. Dist. Ill., 73 C 1392, 15 April 1974. Both cases discussed in Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1974*, ed. Arthur W. Rovine (Washington, D.C.: 1975), 689–92, State Department, 8809.

95. See Department of the Army, Office of the Judge Advocate General (HQ DAJA-IA 1985/7026), memorandum for director, Operations, Readiness, and Mobilization (DAMO-OD), subject: Use of Expanding Ammunition by U.S. Military Forces in Counterterrorist Incidents, 23 September 1985.

CHAPTER 3

STATES HAVE RESPONSIBILITIES AS WELL AS RIGHTS

Since the Ayatollah Khomeini had endorsed the militants' action and demands, the acts of the militants became the acts of the Iranian state.

John R. D'Angelo

It is well settled that a state is bound to use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people.

SS *Lotus*, Permanent Court of International Justice

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or *terrorist acts* in another State or acquiescing in organized activities within its territory directed toward the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force [emphasis supplied].

UN General Assembly Resolution 2625, 25th Session

This chapter examines the concept of state responsibility, that is, the duty that one state owes to another state and to the community of nations. Suppression of international terrorism is part of that duty. When states fail in their responsibility, either through inaction or through active sponsorship or support of terrorism, they commit a delict or international wrong. The injured state is entitled to economic compensation and, in certain instances, to use military force to correct the wrong. This chapter also reviews the question of what evidence is necessary to prove a state's failure of duty and the role of intelligence agencies in gathering that evidence.

Concept of State Responsibility

State responsibility is a much neglected concept. States combating terrorism have failed to invoke the concept in situations where other nations, directly or indirectly, have sponsored, supported, or tolerated international terrorism. The premier advocate for pressing this concept is Prof Richard B. Lillich, University of Virginia School of Law, who writes,

> A body of international law called State Responsibility Law . . . should be invoked in situations where countries either encourage or tolerate terrorist acts or, if such acts are committed without the country's participation, fail to apprehend, punish or extradite terrorists. The law is very clear [and] this body of international law offers a rich vein of relevant precedent that should be worked for profit.[1]

What is the law of state responsibility? States, like individuals, have both rights and duties. Like individuals, states all too frequently seek to stress their rights and ignore their responsibilities. Duties are a complement to the rights; rights cannot exist without duties. The concept of state responsibility was set forth in the *Island of Palmas (United States v. The Netherlands)*, in clear language:

> Territorial sovereignty . . . involves the exclusive right to display the activities of the state. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory.[2]

The Permanent Court of International Justice (PCIJ) of the League of Nations in the Chorzow factory decision had occasion to consider the issue of the duty of states. The court opinion notes:

> Whenever a duty established by any rule of international law has been breached by act or omission, a new legal relationship automatically comes into existence. This relationship is established between the subject to which the act is imputable, who must "respond" by making adequate reparation, and the subject who has a claim to reparation because of the breach of duty.
>
> . . . International responsibility may be incurred by direct injury to the rights of a state and also by a wrongful act or omission which causes injury to an alien.[3]

The elements of the law of state responsibility are: states have duties, these duties are established by international law, an act or omission that violates an obligation established by international law is a wrong or delict, the unlawful act must be imputable to a state, loss or damage must result from the unlawful act, the legal relationship between the violating state and the injured state is automatically altered, and the injured state, depending upon the circumstances, may be entitled to reparations or to use of force.

Three questions arise that require further study. What duties do states have regarding international terrorism? What quality of proof or evidence is required to link a state act or omission to international terrorism and for the injured state to demonstrate loss or damage? And under what circumstances would resort to force (or even threatened use) be legitimate?

International Terrorism and the Duty of States

States have many obligations in international law. Among them are the duty to settle disputes peacefully, to abstain from resort to war as an instrument of national policy, to refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action, to abstain from recognizing any territorial acquisitions made by a state in violation of the UN Charter, to see that no actions within their jurisdiction might pollute the air or water of a neighboring state, to perform all international obligations in good faith, and to conduct all relations in accordance with international law.[4]

But the duty of particular relevance to international terrorism is described in UN Resolution 2625, 25th session, 24 October 1970. This resolution obligates that states refrain from organizing, instigating, assisting, or participating in terrorist acts in another state or acquiescing in organized activity by groups that direct their efforts toward committing terrorist acts in a second state.[5] This duty applies at two distinct levels. The first encompasses state activity itself (direct state involvement); the second concerns the responsibility of a state for the activities of individuals

within its territory (indirect state involvement). This duty is far-reaching.

Chapter 1 identifies four levels of state involvement in international terrorism: sponsorship, support, toleration, and inability to act. International law likewise recognizes that involvement is of a different degree or magnitude. Hence, the kind of response permitted by the injured state will change accordingly.

Although Resolution 2625 represents a clear statement as to state responsibility for terrorist acts, the General Assembly clouded this duty by suggesting that it might be overridden by the right of self-determination. The resolution, in subsequent language, provides that

> every State has the duty to refrain from any forcible action which deprives people . . . of their right to self-determination and freedom and independence. In their action against, and resistance to, such forcible action in pursuit of the exercise of their right of self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.[6]

This language makes the resolution ambiguous. It could lead to the false conclusion that use of terrorist means in pursuit of self-determination is permissible. If this is the true meaning of the resolution, then it would be unacceptable to the West. Although neither decisions nor resolutions of the UN General Assembly are binding under the Charter, the West should be concerned.[7] General Assembly resolutions can become authoritative if it can be said that they represent a reaffirmation by states of present-day international law.

Separate and apart from Resolution 2625, international law recognizes the duty of states not to abet or condone terrorism nor to permit others within their territory from doing so. This recognition arises out of other general duties, such as the duty of nonintervention, the duty to refrain from fomenting civil strife in the territory of another state and to prevent others within its territory from engaging in such activities, and the duty to prevent threats to international peace and security.[8] More specific duties, such as protecting diplomatic agents and providing for the safety and welfare of aliens within state borders, reinforce and

reaffirm state responsibility against terrorism.[9] The totality of these duties has led international lawyers to conclude that it is "already unlawful for states to incite, finance, tolerate, assist or promote acts of illegal terrorism abroad."[10] Therefore, to be consistent with international law the right of self-determination mentioned in Resolution 2625 cannot be interpreted in such a manner as to relieve a state from its responsibility to suppress terrorism.

Direct Involvement

States are liable under the concept of state responsibility for such conduct.[11] States have an obligation *not* to organize, support, abet, or encourage the formation of hostile expeditions within their territory that are directed against another state.[12] Such conduct would violate the sovereignty of other states and would be contrary to the duty of nonintervention and the obligation assumed in article 2(4) of the UN Charter to refrain from the use or threatened use of force against the political independence of another state. States also have an obligation to protect foreign nationals within their territory. Consequently, when a terrorist incident arises, the territorial sovereign has the primary responsibility for managing the situation and for doing so in furtherance of its international obligation.[13]

As an abstract entity, the state becomes liable under international law through the acts or omissions of its officials and agents. These acts or omissions are imputed to the state. The acts of the head of government are always imputable to the state, as are the acts of ministers within the scope of their ministries. The same is true of all other officials and agents, irrespective of governmental level. This includes military and police authorities. Additionally, acts or omissions are imputed to the state even if beyond the scope of the legal power of the official and even if opposite to that directed so long as they are not repudiated by governmental authority and the wrongdoer is not appropriately disciplined or punished.[14]

The 1979–81 Iranian hostage situation is an example of imputability. In this case, "what was originally a nongovernmental act became a governmental act."[15] Other examples of involve-

ment by heads of state in international terrorism are Idi Amin in the 1976 air hijacking to Entebbe and the numerous deeds of Mu'ammar al-Qadhafi of Libya. The list of subaltern involvement is extensive. The nexus in each instance is imputability. State responsibility requires a showing of a *state* act or omission.

Indirect Involvement

State toleration of international terrorism or the inability of a state to act to prevent terrorism are examples of indirect involvement. States that tolerate international terrorism are liable under state responsibility, but those that fail to act through lack of equipment, manpower, firepower, or other weakness are not. This is not to say that states in the latter category have fulfilled their international duty. There is a difference between duty and the concept of state responsibility. Duty is only one element of state responsibility.

State responsibility is rooted in the principle that "the right of jurisdiction which a government exercises within its territory carries with it the obligation to prevent the commission of injurious actions against other states. This has been said to be an obligation inherent in territorial sovereignty."[16] This obligation enjoins states to prevent terrorists from organizing and training within a state, from departing the state to carry out their acts, and from perpetrating terrorist acts against foreign nationals within the state.[17] But a state's obligation regarding terrorists is *not* absolute.

Early writers disagreed on this point. Samuel Pufendorf (1632–94), professor of the law of nature and nations at Heidelberg University and later at Lund University, came the closest to arguing for the absolutist view: "Now it is presumed that the heads of a state know what is openly and frequently done by their subjects, and the power to prevent is always presumed, unless its lack be clearly established."[18] Hugo Grotius (1583–1645), Dutch international jurist and the father of international law, argued to the contrary.

> A civil community, just as any other community, is not bound by the acts of individuals, apart from some act or neglect of its own. . . . But, as we have said, to participate in a crime a person must not only have

> knowledge of it but also the opportunity to prevent it. This is what the laws mean when they say that knowledge, when its punishment is ordained, is taken in the sense of toleration, so that he may be held responsible who was able to prevent a crime but did not do so; and that the knowledge to be considered here is that associated with the will, that is, knowledge is to be taken in connection with intent.[19]

Like Grotius, Swiss diplomat and international lawyer Emerich de Vattel (1714–67) also rejected the absolutist view, because "it is impossible for the best governed state or for the most watchful and strict sovereign to regulate at will all the acts of their subjects and to hold them on every occasion to the most exact obedience; it would be unjust to impute to the nation, or to the sovereign, all the faults of their citizens."[20] Grotius and Vattel prevailed. Both knowledge and opportunity are required to find state responsibility. The standard or test has become due diligence.[21] In the words of Manuel R. García-Mora, professor of law, Fordham University, "the failure of a government to use due diligence to prevent an injurious act of a private person against a foreign state constitutes an international delinquency."[22]

The due diligence standard was affirmed in 1927 by the Permanent Court in SS *Lotus*.[23] In 1949 the International Court of Justice (ICJ) recognized due diligence when it held the Corfu channel case:

> It is clear that knowledge of the mine-laying cannot be imputed to the Albanian Government by reason of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were victims. . . . It cannot be concluded from the mere fact of the control exercised by a state over its territory and waters that that state necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.[24]

United States courts have long recognized the due diligence standard. In 1887 the US Supreme Court observed that "the law of nations [international law] requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof."[25]

The central element of due diligence is fault. State responsibility arises if a state has knowledge or should have had knowledge, and if it fails to act having the opportunity to do so. For example, the 1942 American-Mexican claims commission found in the Texas cattle claims—arising from raids conducted between 1860 and 1875 by Mexican renegades and Kickapoo and other Indians—that the Mexican government had knowledge. The commission further found that, notwithstanding this knowledge, the Mexican government delayed action and failed to put an end to these crimes committed against a nation with which it was at peace. Judgment was against Mexico, which paid $40 million in claims.[26]

As an incidence of sovereignty, a state is required—under the due diligence standard—to prevent, investigate, and punish those who would inflict injury on another state or its nationals. When a nation fails to exercise due diligence, it tolerates the unlawful acts of private individuals or groups. State responsibility arises but it is not the same kind of responsibility that occurs when the state itself becomes a direct sponsor or supporter. In the latter case, the state itself is responsible for the terrorist acts while in the former it is not. In the words of Danish international law professor Max Sorensen, "the state is internationally responsible not for the acts of any private individual, but for its own omissions, for the lack of 'due diligence' of its organs."[27]

Due diligence requires both knowledge and opportunity. Opportunity is a combination of circumstance and capability. How do we treat a state that is presented with an occasion or time to act but lacks the capability to act? García-Mora writes, "If a state has obviously used all means at its disposal to prevent a hostile act of a person against a foreign nation but is physically unable to suppress it, it certainly has *not* discharged its international duty [emphasis supplied]."[28] García-Mora's hypothetical state is incapable of acting and, therefore, lacks opportunity. Since opportunity does not exist, the hypothetical state has acted with all due diligence, thereby satisfying state responsibility. Yet, the international duty to prevent the violent conduct of hostile individuals or groups has not been satisfied.

What remedy is available to the offended state? Since the hypothetical state has committed no delict, the state to which the

duty is owed may not take action against the former. But, can the state to which the duty is owed take unilateral action and perform the duty for the hypothetical state? Ambassador Benjamin Netanyahu, Israel's permanent representative to the United Nations, believes so, "bluntly put, they can either do it themselves or let someone else do it."[29] However, without other extenuating circumstances such as imminent threat to the lives and well-being of hostages, this writer would disagree.

International law views state involvement with international terrorism as occurring at four different levels (table 3). First, some states violate their obligations of state responsibility by sponsoring or supporting international terrorism through direct state action. These states are responsible for terrorist acts as if the state committed them. Second, some states violate state responsibility by tolerating international terrorism through lack of due diligence. These states are responsible for their own lack of due diligence and not for the terrorist acts themselves. Third, a few states, although they do not violate state responsibility obligations, fail to perform their international duty. These states are incapable of taking effective action against international terrorism. These states are responsible for committing no wrong but neither have they preserved any right.

TABLE 3

Conditions under Which States Fail to Exercise Due Diligence

Kind of State Involvement	*Violates International Duty?*	*Violates State Responsibility?*
Sponsorship	Yes	Yes
Support	Yes	Yes
Toleration	Yes	Yes
Inability to act	Yes	No

What Quality of Evidence Is Required?

What sufficiency of proof is necessary to demonstrate the link or nexus between international terrorism and state sponsorship,

support, or toleration, and to show the damage or loss suffered by the injured state? A survey of writings of international legal scholars as well as the open statements of government officials reveals a wide diversity of opinion on this question. Among the standards suggested are "concrete and convincing evidence,"[30] "clear and convincing evidence,"[31] "clear evidence,"[32] "clear proof,"[33] "clear-cut evidence,"[34] "ample evidence,"[35] "hard evidence,"[36] "conclusive evidence,"[37] "sound evidence,"[38] "sufficient evidence,"[39] "solid evidence,"[40] "solid proof,"[41] "strong evidence,"[42] "substantial evidence,"[43] "incontrovertible evidence,"[44] "irrefutable proof,"[45] "unequivocally" established evidence,[46] and many others.

United States law generally recognizes a hierarchy of standards of persuasion. These standards for burden of proof, from highest to lowest, are:

- Beyond a reasonable doubt (criminal law standard).
- Clear and convincing evidence (highest administrative law standard).
- Preponderance of evidence (administrative law used standard commonly in personnel matters).
- Substantial evidence (executive decisionmaking standard).
- A mere scintilla (administrative law standard for certain limited areas such as aviation status and security actions).

Commenting on the evidential standard to show failed state responsibility toward international terrorism, Secretary of State George P. Shultz notes, "We may never have the kind of evidence that can stand up in an American court of law."[47] Nor should the United States or the world community seek that kind of evidence. The purpose of the evidence is not to prove a case in a domestic criminal court but rather to justify the actions of an injured state. These actions can vary from presenting before an international commission or domestic noncriminal court the evidence necessary to support a monetary claim to showing in an international forum the evidence necessary to legitimate a military response. The late William J. Casey, while director of the Central Intelligence Agency (CIA), accurately described what

the standard should be: not "absolute evidence" nor "proof beyond a reasonable doubt" but "sufficient evidence."[48]

The threshold for what constitutes sufficient evidence varies. Factors that must be considered are the threat, the response contemplated, and the audience to be persuaded. What is sufficient evidence to support a monetary claim may be insufficient to support the use of force in self-defense under the UN Charter, in part, because use of force represents a challenge to international peace and security while submission of a claim does not.

To justify the force option, which the law considers an exceptional course of action, exceptional conditions must prevail. If the injured state contemplates the use of force, then it must recognize that it must ultimately present its case to the world community. Article 51 of the Charter requires that measures taken in self-defense be reported to the Security Council. Debate and discussion will follow and this process will necessitate the presentation of evidence. The evidence presented will not be considered by a court in the strict legal sense, unless referred to the International Court of Justice, the judicial organ of the United Nations, but rather will be weighed in a quasi-legal, political sense. Some may view this as a problem but it is a fact of international life.

A serious problem arises where sufficient evidence cannot be produced. In this situation the injured state cannot present the evidence for one of two reasons. First, the evidence cannot be found. "Smoking guns" with the fingerprints of sponsoring states are seldom left lying about to be discovered;[49] states sponsoring international terrorism have "the option of plausible denial or lack of public accountability."[50] Qadhafi's admissions are the exception, not the rule, for state sponsors.[51] Improved intelligence gathering may assist in finding sufficient evidence not otherwise available. Second, by its very nature intelligence methods and sources must be protected.[52] Some evidence may not be releasable and without it the injured state may not be able to present sufficient evidence in the appropriate public forum.

The United States has made it clear that it will not act without sufficient demonstrable evidence. In the words of President Ronald Reagan, "What we now, I think, are looking at is the possibility that some terrorists actually do have national support and back-

ing. With that *established* then you can let that government know that there is going to be redress against that government if these acts continue [emphasis supplied]."[53] Because the United States is the leader of the Western world, because of US commitment to the rule of law inherent in its heritage, because of the checks and balances of the US political system, because of a free press and the role of the media, and because of the standard of conduct demanded by the people of its leaders, the United States has no other option. It cannot act in the way that Israel does toward terrorists. On 4 February 1986, when Israeli defense minister Rabin indicated that Israel had forced down a Libyan civilian airliner without establishing a linkage between terrorists and the aircraft, the United States press guidance noted that "it would appear Israel did not apply the same strict guidelines to the interception of an aircraft that we contend should be required."[54] The best way to establish the linkage required under the standard of sufficient evidence is to improve intelligence capabilities.

How to Improve Intelligence Gathering?

Counterterrorism, especially when countermeasures involving military force are concerned, requires the best intelligence. Intelligence is needed not only to choose the target, estimate possibilities of success or failure, and weigh the dangers of incidental civilian loss and damage, but also to establish direct ties between international terrorist incidents and the nation or organization behind them. Brian Jenkins, terrorism expert with the Rand Corporation, explains why evidence as to linkage is so fundamental. "Here the target is not the terrorist group, which may exist only as a voice on the telephone, but the patron state. To justify the use of force against another country, intelligence must prove the connection between the patron state and the terrorist perpetrators, a difficult task that takes time."[55] The task is difficult because of the inherent nature of terrorist groups and their activities. As William Casey once observed,

> terrorist groups are very tough nuts for intelligence to crack. That is almost self-evident. They are small, not easily penetrated, and their opera-

> tions are closely held and compartmented. Only a few people in the organization are privy to specific operations, they move quickly, and place a very high premium on secrecy and surprise.[56]

Faced with this challenge, intelligence can and must be improved. Human intelligence (HUMINT) is of particular importance when it comes to terrorism. "While satellites and other technological gadgetry are necessary to collect intelligence to fight conventional and nuclear wars, accurate and timely human intelligence is necessary to wage war against terrorism."[57] Yet, as the organization and mode of operation of terrorist groups demonstrate, HUMINT is difficult to obtain. The effort, nonetheless, should be there. Intelligence can be obtained from direct observation, analysis of past terrorist events, evaluation of known terrorist personalities, and studies of known terrorist groups by government and private organizations and citizens. But the best source of information will come from captured and defecting terrorists and from infiltrating active or potential terrorist groups. A major problem associated with infiltration, one which terrorists are well aware of is: will the infiltrator be permitted to commit a crime? a kidnapping? a murder? Terrorists will, no doubt, use the commission of a crime as dues for membership.

The question, then, is, how far should governments go to gather intelligence? Guidelines must be clear, and democracies, by their nature, are severely disadvantaged.[58] Also those who gather intelligence, the United States as well as international agencies, need to increase their levels of coordination and cooperation. Obtaining intelligence on terrorism is difficult. The intelligence acquired must be put to maximum use by analyzing pieces of information in conjunction with other available intelligence.

Former Senator Jeremiah Denton, while chairman of the Subcommittee on Security and Terrorism of the Senate Judiciary Committee, found the coordination and cooperation among the Department of State, the Federal Bureau of Investigation (FBI), the Central Intelligence Agency (CIA), the Defense Intelligence Agency (DIA), the National Security Agency (NSA), the Drug Enforcement Agency (DEA), and various armed forces intelligence agencies to be insufficient.[59]

Cooperation among like-minded nations also needs to be improved. The 1976 Trevi arrangements for exchange of information and experiences on counterterrorism within the European Community are a step in the right direction.[60] But relying on an established international organization may not be the best way to foster cooperation. The International Criminal Police (Interpol), for example, is of limited use for the exchange of intelligence because of the membership of Arab states.[61]

The 1986 Vice President's Task Force on Combatting Terrorism made three recommendations to address the two issues raised above: (1) establish a consolidated federal intelligence center on terrorism, (2) increase collection of human intelligence, and (3) exchange intelligence between governments.[62] Additional areas that deserve attention include US laws, regulations, and directives. A complete and thorough review of the legal framework governing intelligence operations is needed to determine answers to the following questions. Has the United States achieved the proper balance between civil liberties and national security? Are the restrictions on intelligence agencies in their surveillance activities directed at American citizens and other persons appropriate? Are the regulations for use and dissemination of acquired information suitable and well reasoned? Are Attorney General William French Smith's March 1983 criminal conspiracy guidelines for initiating domestic security terrorism investigations the way to go?[63]

For example, some people argue that the Privacy Act[64] and the Freedom of Information Act (FOIA)[65] unduly restrict collection of intelligence. The latter is a particularly serious problem because of the "real risk of disclosure and possible cause of physical harm to someone who supplies information."[66] Possibly, terrorists and terrorist organizations as well as unfriendly foreign governments can, through the FOIA, gain access to sensitive information.[67] The 1986 Anti-Drug Abuse Act contains language that amends the FOIA and may provide some protection to FBI files concerning, among other matters, international terrorism. But opinions are divided over what this amendment really means.[68] Perhaps a detailed analysis of the present state of the law is needed to identify and make any required changes in these two statutes.

When Is Intervention Lawful?

A state that fails, through act or omission, to meet obligations of state responsibility commits an international delict. In such circumstance the legal relationship between the delinquent state and injured state changes. Depending upon the nature of the wrong, the injured state's remedy may be to submit a monetary claim; its option may, however, be the use of military force.

Determining the legitimacy of the use or threatened use of force abroad involves two separate but intertwined legal issues. The first is the propriety of intervening into the territory of another sovereign. The second issue concerns the propriety of the use or threatened use of force itself under contemporary norms of international law. The first issue is considered here while chapters 4–6 examine the second.

Territorial sovereignty is a fundamental principle of international law. The general rule of nonintervention is simply another way of expressing respect for sovereignty. No serious dispute exists over the basic illegality of intervention. However, the norm is not absolute and disputes do arise as to what constitutes the exceptions to the rule.[69] When a state fails to prevent activities within its own jurisdiction that are injurious to another state or its nationals, then that state may forfeit its right to territorial inviolability. As D. W. Bowett, lecturer in law at Manchester University and an expert on intervention law, states,

> It cannot be supposed that the inviolability of territory is so sacrosanct as to mean that a state may harbour within its territory the most blatant preparations for an assault upon another state's independence with impunity; the inviolability of territory is subject to the use of that territory in a manner which does not involve a threat to the rights of other states.[70]

On several occasions in its history the United States has intervened in the territory of another state in response to armed bands (akin to modern day terrorists) who were encouraged, supported, or tolerated by the host government. In 1818 Gen Andrew Jackson was sent into Florida because Spanish authorities had not prevented the Seminole Indians from making raids into the United States. In 1795 Spain had agreed by treaty that she would "keep her indians at peace." Evidence demonstrated that Spain was not only

unable to do so but that Spanish officers were supplying arms and other materiel to the Indians. In announcing the intervention, President James Monroe emphasized that the United States had no territorial designs on Florida and would withdraw its forces as soon as the threat was removed. This action has been described as affirming "the absolute obligation of a state to prevent its territory from being used as a source of hostile action against another state."[71]

A similar situation arose in 1916 with Mexico. It culminated in May 1916 when Francisco "Pancho" Villa raided a Texas town, killing three US soldiers and a nine year old. The secretary of state addressed a note to the Mexican foreign minister that read, in part, "The U.S. Government cannot and will not allow bands of lawless men to establish themselves upon its borders with liberty to invade and plunder American territory with impunity and, when pursued, to seek safety across the Rio Grande, relying upon the plea of their government that the integrity of the soil of the Mexican Republic must not be violated."[72] President Woodrow Wilson sent in US troops under Gen John J. Pershing for the sole purpose of capturing Villa and preventing future raids.

However, *intervention* is a value-laden term that can refer to a minor or major, lawful or unlawful intrusion. International law has a bias against intervention. A basic obligation of states is to abstain from intervention. When intervention is unlawful it is frequently termed *dictatorial*. But international law recognizes that there must be a balance between the sovereignty and independence of states on the one hand and the realities of an interdependent world and international commitment on the other. Thus, in exceptional cases, intervention is lawful. Throughout modern history, however, the exceptions have been misapplied, leading French foreign minister Charles-Maurice de Talleyrand-Perigord, a great cynic and wise man, to conclude that intervention and nonintervention are the same thing.[73]

International law addresses this problem by carving out a form of intervention, called interposition, which specifies the exceptional circumstances of lawful intrusion into another state's territory. Interposition is a response to

> acts or omissions of foreign governments, or persons within the jurisdiction of that government, when that government is itself unable or unwilling to afford the requisite protection. When the mission is accomplished, the interposing state withdraws leaving the government either as it found it or as it may have been altered by internal or local forces of which the interposing government had no interest, concern or control. . . . Interposition . . . is lawful only if there exists a real and immediate requirement for action to be taken in national self-defense or on grounds of humanity.[74]

The hallmarks of interposition are a demanding, compelling, justifiable, and narrowly defined purpose for military action combined with execution to attain specific, finite, and restricted objectives. Interposition seeks to correct an identifiable wrong by achieving a narrow, well-defined end.

TABLE 4

Intervention and Interposition Compared

	Intervention	*Interposition*
Purpose	open-ended	limited
Objective	broad	limited

Examples of interposition in response to international terrorism might be hostage rescue missions, surgical strike missions against terrorist training camps and support facilities provided by sponsoring states, and missions to intercept and divert aircraft on which terrorists are known to be passengers. An example of intervention might be military occupation.

Interposition and the United Nations Charter

A cornerstone of the United Nations Charter system is its attempt to regulate intervention by armed force. Article 2 of the Charter establishes the contemporary guidelines for distinguishing between unlawful intervention and lawful interposition. Article 2(7) makes nonintervention the rule *except* that "this principle shall not prejudice the application of enforcement measures under Chapter VII." Chapter VII of the Charter provides for Security

Council action in response to "threat to the peace, breach of the peace, or act of aggression" (article 39) and for collective and individual self-defense (article 51).[75] Article 51, as an exception to article 2(7), permits states to engage in lawful interposition by use of armed force in the territory of another state if not prohibited by article 2(4).

Article 2(4) contains the Charter's principle restraint on the use or threatened use of armed force. It provides that

> all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[76]

This statement, seemingly simple in its meaning, is quite complex. Not all scholars agree on the meaning of this provision. Oscar Schachter, Hamilton Fish Professor of International Law and Diplomacy, Columbia University, writes that, although "nearly all of its key terms raise questions of interpretation,"[77] article 2(4) "has a reasonably clear core meaning."[78] Its primary intent is to outlaw war in the classical sense, that is, to make state-initiated warfare illegal, and to restrict severely the lawful use of force in other circumstances. There is not a more important principle in international law than the one contained in article 2(4).[79]

The term *force* as used in article 2(4) means armed force. Does a state that sponsors, supports, or tolerates international terrorists employ force against another state in violation of article 2(4) as if it had sent armies on the march against it? Danish international jurist Max Sorensen seems to suggest an affirmative answer:

> A state uses force when it sends or permits the sending of irregular forces or armed groups, including non-nationals, across the frontier to operate in another state. . . . An indirect involvement of a government in an armed venture outside its territory constitutes a use of force and is governed by the same law as is applicable to open hostilities directed against another state.[80]

British international jurist Rosalyn Higgins would seem to agree. She argues that

> "use of force" by Governments can also be passive, as well as active, can be indirect as well as direct; thus the arming of rebel groups in another state, or the refusal to forbid the training of rebels against another Government on one's own territory, or the failure to restrain volunteers from fighting in another State, are all forms of aggression commonly termed "indirect aggression"—and from a functional point of view are a use of force.[81]

Although international scholars like Sorensen and Higgins appear to believe that state sponsorship and support of international terrorists constitutes a use of force contemplated by article 2(4), the harder question is whether aid alone, such as that given to the Nicaraguan contras, would be considered a use of force under article 2(4)? This article is two-edged and efforts to find an interpretation which can be applied with some consistency have not been successful.[82]

A second issue is whether a state can use force to enforce rights under international law. Put another way, can a state use force for purposes other than to respond to force? The strict constructionists argue that a broad concept of self-help is incompatible with article 2(4). They rely on the opinion of the International Court of Justice in the Corfu channel case; the court denied the United Kingdom's alleged right to intervene in Albania to assure freedom of navigation and to preserve evidence for use in judicial proceedings.[83] Other international scholars now disagree. Yale University law professor Myres McDougal was moved to write, "I am ashamed to confess that at one time I lent my support to the suggestion that article 2(4) and the related articles did preclude the use of self-help less than self-defense. On reflection, I think that this was a very grave mistake, that article 2(4) and article 51 must be interpreted differently."[84]

A third issue, related to the second, is whether a reinterpretation of the Charter's meaning, and in particular article 2(4), is in order because of the United Nations' general failure to protect international rights. The argument made by the realists, as they call themselves, is that the United Nations was created on the false premise that the five great powers would continue to work together in the postwar era for international peace and security. Article 2(4), they argue, represented a quid pro quo. States would forgo

self-enforcement of their rights and the United Nations organization would do it for them. Since the organization never became capable of doing so, article 2(4) must be reconsidered.[85] Columbia University law professor Oscar Schachter, an expert on the creation of the United Nations, disagrees:

> The legislative history of article 2 of the Charter does not support the notion that effective enforcement of collective security was a prerequisite to renouncing the use of force. True, the Charter's drafters must have hoped that the Security Council and other relevant U.N. organs would obviate individual recourse to force. But they were realistic enough to recognize that this might not be achieved; that is precisely why they preserved the right of self-defense to respond to armed attack. Force could meet force but, unless authorized by the Security Council, force could not answer non-forcible deprivation of rights. It is hardly plausible to infer from these provisions that the failure to prevent illegal force now allows an individual state to use force freely. No evidence or logical reason supports the assumption that the drafters or the signatory governments intended this radical result. Rather, widespread affirmation of the rules on force *as jus cogens*, preemptory norms of customary law, shows that states regard those rules as legally independent of the proper functioning of U.N. organs.[86]

The realists also argue that article 2(4) is a dead letter because of contrary state practice. One study indicates there have been more than 120 significant armed conflicts since 1945. Another study notes more than ten million deaths occurred in the 65 major conflicts that took place between 1960 and 1982. Yet another study indicates that the United States, the Soviet Union, France, and the United Kingdom have conducted more than 70 military interventions since 1946.[87] The strict constructionists respond that "when a principle is repeatedly and unanimously declared to be a basic rule from which no derogation is allowed, even numerous violations do not become state practice constitutive of a new rule. . . . No state has ever suggested that violations of article 2(4) have opened the door to free use of force."[88]

Manipulation of the Charter does not seem the proper approach. If the terms of that agreement are inadequate, then the proper approach would appear to be renegotiation of the document itself. Such action is highly unlikely and nations are left with the dilem-

ma identified by Prof Gerhard von Glahn, University of Minnesota at Duluth:

> What the provisions of the Charter have done, in effect, is to deprive states of valuable tools of self-help and of enforcement of international rights without substituting a really workable method for achieving the same ends. It remains to be seen whether states will stand by the prohibition if and when interests or rights considered to be vital are affected and peaceful methods of settlement or sanction fail.[89]

Fourth and finally, what limitations does article 2(4) place on the use of force generally? Some scholars take a narrow view believing, as does British international lawyer Sir Humphrey Waldock, that

> Article 2(4) prohibits entirely any threat or use of armed force between independent States except in individual or collective self-defense under Article 51 or in execution of collective measures under the Charter for maintaining and restoring peace. Armed reprisals to obtain satisfaction for an injury or armed intervention as an instrument of national policy otherwise than for self-defense is illegal under the Charter.[90]

Others cannot agree. Oscar Schachter, taking the broader and generally accepted view, writes, "It is generally assumed that the prohibition [of article 2(4)] was intended to preclude all use of force except that allowed as self-defense or authorized by the Security Council under chapter VII of the Charter. Yet the article was not drafted that way. The last twenty-three words contain qualifications."[91] The qualifying language of article 2(4) prohibits the use of force only in three circumstances: if it is employed against the territorial integrity of a state, against the political independence of a state, or in any other manner inconsistent with the purposes of the Charter.

The qualifying language of article 2(4) is important because, to the extent not forbidden by the Charter, the projection of force abroad is lawful interposition. What does it mean that force cannot be applied against the territorial integrity of a state? Territorial integrity is not the same as territorial inviolability. A state may retain its territorial integrity even if its frontiers are violated. "Loss of territorial integrity implies the loss of effective control over the area, and possibly a loss of authoritative jurisdiction as well,

if a specified area is formally ceded under the exigencies of hostile military operations."[92] Thus, a state may take military action against another state in response to international terrorism, and, indeed, may enter the latter's territory, and still not violate its territorial integrity. For example, it has been suggested that the 7 June 1981 Israeli raid on the Iraqi nuclear reactor was not a use of force against either Iraq's territorial integrity or its political independence. No portion of Iraq's territory was taken from Iraq by the bombardment. "A *use* of the territory—namely, to construct a nuclear reactor—was interfered with, but the territory itself remained integral."[93]

Similarly, force directed against the political independence of a state is not force directed merely at a state. It is force "directed at controlling the Government and other institutional bodies of a State, either by setting up a particular form of government with defined ideological propensities or by forcing existing institutions to act in the interests of a foreign power."[94] Force directed at international terrorists or their state sponsors and supporters with a limited purpose other than altering the institutions or political independence of a state would not be prohibited by this provision. Citing the example of the raid on the Iraqi nuclear reactor, one could argue that "Iraq's political independence [was not] compromised. Iraq's *power* was undoubtedly lessened, but in what sense was its governmental authority vis-à-vis other sovereign governments diminished?"[95]

The proscription against any use of force "in any manner inconsistent with the purposes of the United Nations" was intended to ensure that there were no loopholes in the Charter.[96] The language requires the user of force to determine if its action would be consistent with the purposes of the United Nations. Article 2(4) provides the broad framework for judging any specific legal argument justifying the use of force. It provides the general principles or guidelines. It does not answer all questions. In many cases, it only raises more issues: What constitutes force? What may force be used to protect? What are the basic limitations on use of force?

Summary and Transition

State responsibility is a much neglected concept in dealing with international terrorism. As a complement to rights, states have duties to the international community and to other states. States that sponsor, support, or tolerate international terrorism, as well as states that do not act because of their inability to do so, fail in their international duty. A concerted positive effort must be made to place state involvement vis-à-vis international terrorism into the context of state responsibility and international duty. When a state fails in its duty, that failure should be noted. States injured by states that fail in their duty should, in appropriate cases, consider filing monetary damage claims. These claims should be filed even in cases where there is a strong indication they will not be given appropriate consideration. Establishing the record is, in itself, important. On occasion such efforts do prove successful. One need only consider the work of the US-Iranian Claims Commission sitting in The Hague, Netherlands, to resolve outstanding claims arising, in part, from the 1979–81 hostage situation. Part of the success of this commission was the US leverage created by freezing Iranian assets in the United States. Such innovative approaches need to be considered.

On occasion the use of force is the appropriate response to a failure of state responsibility. To measure the appropriateness of such a response, sufficient evidence is required to establish the critical link between the state and international terrorism. Once established, interposition within the framework of article 2(4) becomes a very real option.

Once having determined the propriety of intervening into the territory of another state, a state must address the issue of the propriety of using force. An opinion by the International Law Division, Headquarters USAF (HQ USAF/JACI), suggests self-defense (article 51 of the UN Charter) as a justification for the use of force.

> A State has the responsibility to prevent armed bands (terrorists) from utilizing its territory to perpetrate attacks on another State. If the State knows or should know that its territory is being utilized as a base for terrorism and is unable or unwilling to control and restrain such activities,

then armed intervention, having as its sole object the removal or destruction of the terrorist bases would appear to be justifiable under Article 51.[97]

Chapter 4 considers self-defense; subsequent chapters consider other potential justifications.

NOTES

1. Senate, Committee on Foreign Relations, Subcommittee on Foreign Assistance, *Hearings on International Terrorism*, statement by Richard B. Lillich, 95th Cong., 1st sess., 14 September 1977, 14–15, 18. See also Lillich, "Controlling Transnational Terrorism: The Relevance of International Law," in American Society of International Law, *Proceedings of the 72nd Annual Meeting*, 27–29 April 1983 (Washington, D.C.: 1985), 343; and Lillich, "International Terrorism," in International Law Association (ILA), *Report of the Fifty-Seventh Conference Held at Madrid* (Great Britain: 1978), 139–40.

2. Judge Max Huber, *Island of Palmas (United States v. The Netherlands)*, United Nations, *Reports on International Arbitral Awards*, vol. 2 (1949), 839.

3. Chorzow factory, Permanent Court of International Justice (PCIJ), series A, no. 17 (1928), 29. See also Lt Comdr Michael Franklin Lohr, "Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism," *Naval Law Review* 34 (1985): 9–10; and Max Sorensen, *Manual for Public International Law* (New York: St. Martin's Press, 1968), 533–35.

4. See "Charter of the United Nations," 26 June 1945, *Statutes at Large*, vol. 59:1031; United States Treaty Series 993; Department of State, *United States Treaties and Other International Agreements, 1776–1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 3, *Multilateral, 1931–1945*, 1153; "Charter of the United Nations: Amendments to Articles 23, 27, and 67," 31 August 1965, *Treaties and Other International Acts Series* (TIAS) 5857, *United States Treaties and Other International Agreements* (UST), vol. 16, pt. 2, 1134; United Nations Treaty Series (UNTS), *Treaties and Other International Agreements Registered or Filed and Reported with the Secretariat of the United Nations*, vol. 557 (1966), no. 8132, 143; "Charter of the United Nations: Amendments to Article 109," 12 June 1969, TIAS 6529, UST, vol. 19, pt. 5, 5450; "Charter of the United Nations: Amendments to Article 61," 24 September 1973, TIAS 7739, UST, vol. 24, pt. 2, 2225; see also Gerhard von Glahn, *Law Among Nations*, 3d ed. (New York: Macmillan, 1976), 177-80.

5. United Nations General Assembly, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among

States," 24 October 1970, Resolution 2526, Official Records (UN GAOR), 25th sess., supp. 28, A/8028 (1970), 121.

6. Maj William R. Farrell, USAF, "Terrorism Is . . . ?" *Naval War College Review* 32, no. 3 (May–June 1980): 65.

7. See Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April–May 1984): 1622.

8. See UN General Assembly, "Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Political Independence and Sovereignty," 21 December 1965, Resolution 2131, UN GAOR, 20th sess., supp. 14, A/6014 (1965), 11; and von Glahn, 177–80.

9. See article 29, "Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes," 18 April 1961, TIAS 7502, UST, vol. 23, pt. 3, 3227; UNTS, vol. 500 (1964), no. 7310, 95. A US State Department publication notes: "It is internationally accepted that governments are responsible for the safety and welfare of persons within the borders of their nation." Department of State, "International Terrorism: U.S. Policy on Taking Americans Hostage," June 1986, 1.

10. Jordan J. Paust, "Entebbe and Self-Help: The Israeli Response to Terrorism," *Fletcher Forum* 2, no. 1 (January 1978): 92.

11. See Seymour Maxwell Finger, "International Terrorism and the United Nations," chap. 11 in *International Terrorism: National, Regional and Global Perspectives*, ed. Yonah Alexander (New York: Praeger Publishers, 1976), 323–48; Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Martin's Press, 1985), 149–51; and Lohr, 708.

12. See Sir Hersch Lauterpacht's statement, "International law imposes upon the state the duty of restraining persons resident within its territory from engaging in such revolutionary activities against friendly states as amount to organized acts of force in the form of hostile expeditions against the territory of those states." In Lauterpacht, "Revolutionary Activities by Private Persons against Foreign States," *American Journal of International Law* 22 (1928): 126. See also D. W. Bowett, *Self-Defence in International Law* (New York: Frederick A. Praeger, 1958), 45–49; Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Netherlands: Martinus Nijhoff, 1962); and United States, Arms Control and Disarmament Agency (USACDA), *The International Law of Indirect Aggression and Subversion*, prepared by A. J. Thomas, Jr., Ann van Wynen Thomas, and Oscar A. Salas, ACDA, GC-41, 30 June 1966, executive summary, 4–6.

An interesting question is the extent to which the United States has fulfilled this international duty. The Vice President's Task Force on Combatting Terrorism notes: "The International Trafficking in Arms Regulations have been strengthened to require a license to train foreign persons in the use of certain firearms; however, mercenary/survival training camps still operate domestically within the law." Vice President, *Public Report of the Vice President's Task Force on Combatting Terrorism* (Washington, D.C.: February 1986), 26. See

also Charles Maechling, Jr., "Containing Terrorism," *Foreign Service Journal*, July–August 1984, 35.

13. See Gail Bass et al., *Options for U.S. Policy on Terrorism* (Santa Monica, Calif.: Rand Corp., 1981), 3, Rand, R-2764-RC; Department of State, "International Terrorism," *Selected Documents* 24, 1986, 4; and Vice President, *Report on Terrorism*, 9.

14. See Maryan N. A. Green, *International Law: Law of Peace* (Plymouth, England: Macdonald and Evans, 1982), 207.

15. Michael Stohl and George A. Lopez, *The State as Terrorist: The Dynamics of Governmental Violence and Repression* (Westport, Conn.: Greenwood Press, 1984), 6. See also John R. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality under International Law," *Virginia Journal of International Law* 21, no. 3 (1981): 507; and "Iran: Consequences of the Abortive Attempt to Rescue the American Hostages," *Conflict* 3, no. 1 (1981): 62.

16. Charles G. Fenwick, *International Law*, 3d ed. (New York: Appleton-Century-Crofts, 1948), 301. See also Garcia-Mora, 5-9; and Green, 208.

17. See *Bush v. United States*, 389 F. 2d 485 (1968). Gerhard von Glahn (p. 172) describes the case as follows:

> The duty to abstain from armed intervention clearly means also that no state may permit the use of its territory for the staging of hostile expeditions against another state. Thus the United States acted correctly in arresting, on January 2, 1967, a group of seventy-three armed men on a Florida key. The individuals in question were preparing to invade Haiti in an effort to overthrow the incumbent government with the expected help of indigenous malcontents. A year later, the leaders of the group were sentenced to prison in a U.S. District Court.

18. Samuel Pufendorf, *De Jure Naturae et Gentium*, Libri Octo [the law of nature and of man, 8 bks.], trans. by C. H. and W. A. Oldfather (Oxford, England: n.p. 1934), bk. 8, chap. 6, sec. 12.

19. Hugo Grotius, *De Jure Belli ac Pacis*, Libri Tres [the law of war and peace, 3 bks.], trans. F. Kelsey (Oxford, England: Carnegie Endowment for International Peace, 1925), bk. 2, chap. 21, sec. 2.

20. Emerich de Vattel, *Le Droit des Gens* [the law of nations], trans. C. G. Fenwick (Washington, D.C.: n.p., 1916), bk. 2, chap. 6, sec. 73. In section 72, Vattel writes,

> The Nation, or sovereign, must not allow its citizens to injure the subjects of another state, much less to offend that state itself; and this not only because no sovereign should permit those under his rule to violate the precepts of natural law, which forbids such acts, but also because Nations should mutually respect one another and avoid any offense, injury, or wrong; in a word, anything which might be hurtful to others. If a sovereign who has the power to see that his subjects act in a just manner permits them to injure a foreign nation, either the state itself or its citizens, he does no less a wrong to that Nation than if he injured it himself. Finally, the very safety of the state and of society at large demands this case on the part of every sovereign.

21. See Bowett, 49; and Thomas, Thomas, and Salas, executive summary, 4–5.

22. García-Mora, 20.

23. Judge John B. Moore, SS *Lotus (France v. Turkey)*, PCIJ, series A, no. 10 (1927), 88.

24. Corfu channel case (*United Kingdom v. Albania*), merits, 1949, ICJ 18.

25. *United States v. Arjona*, 120 US 479 (1887) 484.

26. Texas cattle claims as reported in Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 8, ed. Marjorie M. Whiteman (September 1967), 751, State Department, 8290.

27. Sorensen, 560. See also James L. Brierly, "The Theory of Implied State Complicity in International Crimes," in *British Year Book of International Law, 1928*, vol. 9 (Oxford, England: Oxford University Press for Royal Institute for Foreign Affairs, 1928), 42.

28. Yehuda Z. Blum, "The Beirut Raid and the International Double Standard," *American Journal of International Law* 64, no. 1 (January 1970): 84.

29. Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 57.

30. See Senate, Committee on the Judiciary, Subcommittee on Security and Terrorism, *Report on "State-Sponsored Terrorism,"* 99th Cong., 1st sess., June 1985, Senate print 99-56, 59.

31. See Francis A. Boyle et al., "International Lawlessness in Grenada," *American Journal of International Law* 78, no. 1 (January 1984): 172.

32. See Col Dennis M. Corrigan, USA, "Legal Use of Military Force to Counter Terrorism," strategic study 86-1 E-85 (National War College, Washington, D.C., February 1986), 12; see also President Ronald Reagan quoted in "US Exercises Right of Self-Defense against Libyan Terrorism," *Department of State Bulletin* 86, no. 2111 (June 1986): 1.

33. See James M. Markham quoting West German adviser's comments on Libyan raid in "German Voices Doubts on Qaddafi Terror Role," *New York Times*, 2 September 1986, 8.

34. See "Terrorism's Grim Upsurge: New Attacks Test Reagan's Will to Deliver Threatened Response," *U.S. News & World Report*, 22 September 1986, 32.

35. On questioning standard of ample evidence, see Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 19.

36. For a discussion of the standard insisted upon by some US senators for establishing Soviet complicity with terrorism, see Lynch, 46. James McCartney and Owen Ullmann note that lack of "hard evidence" was the reason given by an administration official as to why further action against Libya was not taken. McCartney and Ullmann, "U.S. Is Said to Brace for Libya Crisis," *Philadelphia Inquirer*, 26 August 1986, 4. Libya also demanded that the United States show "hard evidence." "Libya Wants U.S. to Show Some Proof,"

Alabama Journal–Montgomery Advertiser, 31 August 1986, 16(A). See also Louis G. Fields, Jr., "The Third Annual Waldemar A. Solf Lecture in International Law: Contemporary Terrorism and the Rule of Law," *Military Law Review*, no. 113 (Summer 1986): 13. Fields notes that "hard evidence" is what the incredulous and apprehensive world will demand.

37. Karen DeYoung points out that "conclusive evidence" of Syrian involvement was cited as justification for the break in diplomatic relations. DeYoung, "Britain Cuts Ties with Syria over El Al Bombing Links: Hindawi Guilty; Damascus Reacts," *Washington Post*, 25 October 1986, 1(A). The US asserted "conclusive evidence" of Libyan involvement in terrorism to support the Libyan raid of April 1986. See State Department, "International Terrorism," 1. See also Robert Grant, "Terrorism: What Should We Do?" in *Terrorism*, ed. Steven Anzovin, The Reference Shelf, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 163.

38. See Senate, *State-Sponsored Terrorism*, 92.

39. See William J. Casey, "International Terrorism: Potent Challenge to American Intelligence," address to Fletcher School of Law and Diplomacy, Tufts University, Medford, Mass., 17 April 1985, reprinted in *Vital Speeches* 51, no. 23 (15 September 1985): 716; and Robert C. McFarlane, "Terrorism and the Future of Free Society," in American Bar Association Committee on Law and National Security, *Intelligence Report* 7, no. 5 (May 1985): 7.

40. See "Terrorism's Grim Upsurge," 32; see also State Department, "International Terrorism," 1.

41. See Brian Michael Jenkins, "Military Force May Not Be Ruled Out," Rand, 7103, Rand Corp., Santa Monica, Calif., June 1985, 3.

42. See Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1977*, ed. John A. Boyd (Washington, D.C.: 1979), 150–51, State Department, 8960.

43. Ibid.

44. See Brian Michael Jenkins, "Combatting Terrorism Becomes a War," Rand, 6988, Rand Corp., Santa Monica, Calif., May 1984, 6.

45. Some officials and writers seek "irrefutable proof" that links the Soviet Union to terrorism. For a discussion of this point see Claire Sterling, *The Terror Network: The Secret War of International Terrorism* (New York: Reader's Digest Press, 1981), 291.

46. Garcia-Mora, 63.

47. George P. Shultz, "Terrorism in the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 445.

48. Casey, "Terrorism: Potent Challenge," *Vital Speeches*, 716.

49. See Fields, 13; and Walter Laqueur, "Reflections on Terrorism," *Foreign Affairs* 65, no. 1 (Fall 1986): 98.

50. See Senate, *State-Sponsored Terrorism*, 58–59.

51. See Lynch, 26–28, 46; State Department, "International Terrorism," 1; and Department of State, Office for Combatting Terrorism, "Libya Talking Points," 1 April 1986.

52. See 16 April 1986 remarks of Secretary Shultz in Worldnet interview: "We hesitate always to be too explicit with it because being too explicit tends to dry up your intelligence." Quoted in Department of State, "US Exercises Right of Self-Defense against Libyan Terrorism," *Department of State Bulletin* 86, no. 2111 (June 1986): 9. See also John M. Goshko, "New Front in War on Terrorism: Cultivating Foreign Opinion," *Washington Post*, 18 July 1986, 17; and Anthony C. E. Quainton, "Terrorism: Do Something! But What?" *Department of State Bulletin* 79, no. 2030 (September 1979): 62.

53. President Ronald Reagan quoted in *Wall Street Journal*, 8 February 1985, and reprinted in Senate, *State-Sponsored Terrorism*, 20–21.

54. Department of State, "Press Guidance on Israeli Force-Down of Libyan Aircraft," 5 February 1986, 2.

55. Jenkins, "Combatting Terrorism Becomes a War," 5. See also Grant, "Terrorism: What Should We Do?" in Anzovin, 169; and Lynch, 82–83.

56. Casey, "Terrorism: Potent Challenge," in Anzovin, 68; reprinted from *Vital Speeches* 51, no. 23 (15 September 1985).

57. Richard D. Crabtree, "U.S. Policy for Countering Terrorism: The Intelligence Dimension," *Conflict* 6, no. 1 (Winter 1986): 13.

58. As Secretary George P. Shultz noted, "Human intelligence will be particularly important, since our societies demand that we know with reasonable clarity just what we are doing." See Shultz, "Terrorism: The Challenge to Democracies," in Anzovin, 58. See also Maechling, 37; and William L. Waugh, Jr., *International Terrorism: How Nations Respond to Terrorists* (Salisbury, N.C.: Documentary Publications, 1982), 135.

59. The former senator from Alabama, remarked:

> There appears to be a great need to coordinate the collection and analysis of the information we get. We have the FBI, Department of State, CIA, the Defense Intelligence Agency, NSA, DEA, and various Armed Forces Intelligence groups, collecting, analyzing, and disseminating information on terrorism. And, although there is some measure of coordination and cooperation, it is not sufficient. We must ensure adequate and appropriate efforts among all our agencies in every state of the intelligence process.

Quoted by Lynch, 2-3.

60. See United Kingdom, Foreign and Commonwealth Office, "International Reaction to Terrorism," background brief, January 1986, 5.

61. See "Terrorism Can Be Stopped," *Skeptic*, no. 11 (January–February 1976): 49.

62. Vice President, *Report on Terrorism*, 25.

63. Attorney General William French Smith's guidelines focused on the criminal conspiracy approach and provided that a

> domestic security terrorism investigation may be initiated when the facts or circumstances reasonably indicate that two or more persons are engaged in an enterprise for the purpose of furthering political and social goals wholly or in part through activities that involve force or violence and a violation of the criminal laws of the United States.

Quoted by Crabtree, 13. See also Ernest Evans, "Toward a More Effective U.S. Policy on Terrorism," in *Political Terrorism and Energy: The Threat and Response*, ed. Yonah Alexander and Charles K. Ebinger (New York: Praeger, 1982), 229-32; and Brian Michael Jenkins, "Combatting Terrorism: Some Policy Implications," Rand, 6666, Rand Corp., Santa Monica, Calif., August 1981, 8.

64. *Privacy Act, US Code*, Title 5, secs. 552a et seq.

65. *Freedom of Information Act* (FOIA), *US Code*, Title 5, 552 et seq.

66. Crabtree, 7.

67. See Vice President, *Report on Terrorism*, 16; and Quainton, 62.

68. See Edgar O'Ballance, "New FOIA Laws Protect FBI," *ABA Journal* 73 (1 February 1987): 111.

69. See Bowett, 51; Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics," *Journal of International Affairs* 37, no. 2 (Winter 1984): 311, n. 2; and Gal-Or, 121.

70. Bowett, 54.

71. Eugene V. Rostow, in American Society of International Law, *Proceedings of the 77th Annual Meeting*, 14–16 April 1983 (Washington, D.C.: 1985), 35.

72. See Department of State, *Digest of International Law*, vol. 3, ed. G. H. Hackworth (Washington, D.C.: 1941), 282–91.

73. See James L. Brierly, *The Law of Nations*, 6th ed., ed. Sir Humphrey Waldock (New York: Oxford University Press, 1963), 402–403; Rosalyn Higgins, "Intervention and International Law," chap. 3 in *Intervention in World Politics*, ed. Hedley Bull (Oxford, England: Clarendon Press, 1984), 30-40; Richard B. Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for Constructive Alternatives," chap. 11 in *Law and Civil War in the Modern World*, ed. John Norton Moore (Baltimore: Johns Hopkins University Press, 1974), 235; Lohr, 34; Thomas, Thomas, and Salas, 19; and von Glahn, 162-63.

74. Lt Comdr Bruce Harlow, USN, "The Legal Use of Force . . . Short of War," US Naval Institute, *Proceedings*, 92, no. 11 (November 1966): 91–92.

75. See Bowett, 51–52.

76. "Charter of the United Nations," art. 2(4).

77. Schachter, "Right of States," 1624. See also International Law Association, American Branch, "Report of the Committee on Use of Force in Relations among States," *1985–86 Proceedings and Committee Reports* (New York: International Law Association, American Branch, 1986), 75–86.

78. Schachter, "Right of States," 1633.

79. See John Norton Moore, "Legal Standards for Intervention in Internal Conflicts," *Georgia Journal of International and Comparative Law* 13, supp. (1983): 193.

80. Sorensen, 748.

81. Higgins, 278.

82. See Moore, 195; and John F. Murphy in American Society of International Law, *Proceedings of the 77th Annual Meeting*, 14–16 April 1983 (Washington, D.C.: 1985), 45. See also UN General Assembly, "Definition of Aggression," Resolution 3314, UN GAOR, 29th sess., supp. 31, A/9631 (1974), 142.

83. Corfu channel case, merits, 1949 ICJ 35.

84. Myres McDougal, "Authority to Use Force on the High Seas," *Naval War College Review* 20 (1967): 28–29.

85. See D'Angelo, 495–97; remarks of Thomas M. Franck, in American Society of International Law, *Proceedings of the 78th Annual Meeting*, 12–14 April 1984 (Washington, D.C.: 1986), 41–42; Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States," *American Journal of International Law* 64, no. 4 (October 1970): 809–37; W. Michael Reismann, editorial comment, "Coercion and Self-Determination: Construing Charter Article 2(4)," *American Journal of International Law* 78, no. 3 (July 1984): 642–45; and Reismann, "Article 2(4): The Use of Force in Contemporary International Law," in *Proceedings of the 78th Annual Meeting*, 74–87.

86. Oscar Schachter, "In Defense of International Rules on the Use of Force," *University of Chicago Law Review* 53, no. 1 (Winter 1986): 126. See also Eugene V. Rostow's remarks in *Proceedings of the 77th Annual Meeting*, 50; and Herbert K. Tillema and John R. van Wingen, "Law and Power in Military Intervention," *International Studies Quarterly* 26, no. 2 (June 1982): 226–27.

87. See remarks of Richard B. Bilder in *Proceedings of the 77th Annual Meeting*, 68; and Tillema and van Wingen, 220 and 236.

88. Schachter, "International Rules," 131.

89. Von Glahn, 512.

90. Sir Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours* 81, pt. 2 (1952): 493. See also Richard B. Lillich, "Forcible Self-Help under International Law," *US Naval War College International Law Studies* 62 (1980): 129–30; and Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 12, ed. Marjorie M. Whiteman (Washington, D.C: August 1971), 6–7, State Department, 8586.

91. Schachter, "Rights of States," 1625. See also Paust, 89–90.

92. Higgins, 293. See also Bowett, 31.

93. Anthony D'Amato, editorial comment, "Israel's Air Strike upon the Iraqi Nuclear Reactor," *American Journal of International Law* 77, no. 3 (July 1983): 585.

94. See Bowett, 235; Higgins, 284; and *Digest of International Law*, vol. 12:18.

95. D'Amato, 585.

96. See *Digest of International Law*, vol. 12:15.

97. Department of the US Air Force, Office of The Judge Advocate General (HQ USAF/JACI), letter, subject: Use of Force against Terrorist Organizations and Personnel, 24 January 1985, para. 5.

CHAPTER 4

INDIVIDUAL SELF-DEFENSE AS A JUSTIFICATION FOR THE USE OF FORCE

Vim vi repellere licet, modo fiat moderamine inculpatae tutelae, non ad sumendam vindictam, sed ad propulsandum injuriam. [It is lawful to repel force by force, provided it be done with the moderation of blameless defense, not for the purpose of taking revenge, but to ward off injury.]

Legal maxim

In international law, the doctrine of self-defense provides the state with a legal basis for actions taken in response to the illegal use of force by another state, in the absence of effective action by the international community. When properly invoked, the doctrine will serve to excuse state action involving both the unilateral use of force and a breach of the territorial integrity of another state that would otherwise be illegal under both rules of customary international law and the Charter of the United Nations.

John C. Bender

Self-defense is not only our right, it is our duty. It is the purpose behind the mission undertaken tonight—a mission fully consistent with Article 51 of the UN Charter.

President Ronald Reagan

A dominant trend of the twentieth century, culminating in the United Nations Charter, has been to restrict the use of force as a means for the settlement of international disputes. This chapter and the two subsequent chapters review the legal arguments justifying a forcible response in contemporary international relations. Three aspects of each legal argument are considered: What is the substance of the argument or justification? What conditions must be met for a state to rely on the argument as a justification? How well accepted is the legal argument by the international communi-

ty? The concept of self-defense underlies many of the justifications for the use of force. This chapter addresses the issue of states acting alone in exercise of individual self-defense. Chapter 5 focuses on states acting in concert in exercise of collective self-defense or in regional enforcement or peacekeeping actions. Chapter 6 examines other justifications. Appendix A summarizes these legal arguments or justifications.

When confronted with a situation demanding the use of force, a state may rely on several legal arguments or justifications for its military action. Multiple justifications have many advantages. First, multiple arguments appear to strengthen the state's position. A state may need to demonstrate the legitimacy of its forceful response to obtain the support of its citizenry and the world community at large. Second, multiple arguments enhance the scope of authorized military action. As we shall see, each legal argument requires that force be used to achieve a narrow purpose. The more arguments, the more purposes that can be achieved and the broader the authorized scope of action.

Doctrine of Individual Self-Defense

Individual self-defense contrasts with collective or multistate self-defense. Individual self-defense is an ancient and fundamental right of states recognized from time immemorial. Hugo Grotius, the father of international law, observed in 1625 that self-defense rests on the "fact that nature commits to each his own protection."[1] Self-defense is no less important today in the face of weak international organizational enforcement machinery. D. W. Bowett—president of Queen's College, Cambridge University, lecturer in law at Cambridge University and the University of Manchester, and an acknowledged expert on self-defense—writes:

> In some measure . . . the right must remain; for no matter how effective the means of protection afforded by the centralized machinery of society are, there will inevitably exist circumstances in which certain essential rights or interests of the individual can only be protected by conceding to the individual the right to take initial measures of protection until the centralized machinery comes into operation.[2]

Recognizing the severe inadequacies of the present-day centralized enforcement machinery in the United Nations, Abraham D. Sofaer, US Department of State legal adviser, notes that "the policeman is apt protection against individual criminals; but national self-defense is the only protection against the criminal state."[3]

Individual self-defense is universally accepted by the world community as legalizing the use of force. Although article 2(4) of the UN Charter contains a basic prohibition against the use of force,[4] article 51 of the Charter is a recognized exception. Article 51 provides:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken measures to maintain international peace and security. Measures taken by Members in the exercise of the right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action it deems necessary in order to maintain or restore international peace and security.[5]

In addition to legalizing the use of force, article 51 also legalizes the projection of force into the territory of another state. The general rule is that a nation may not intervene or enter into the territory of another sovereign. Nor may a state stop, divert, board, detain, or otherwise interfere with another's aircraft or ships. The right of individual self-defense, as contained in article 51, which is a part of chapter VII of the UN Charter, is recognized in article 2(7) as taking precedence over the rights of sovereignty and nonintervention.[6]

Strictly speaking, the right of individual self-defense is a privilege.[7] According to Max Sorensen, professor of international law at Aarhus University in Denmark, "international law recognizes that certain acts, which would ordinarily be unlawful, are, when committed in self-defense, legitimate and do not give rise to responsibility."[8] Thus, in principle, articles 2(4) and 2(7) establish the prima facie illegality of use or threatened use of force and intervention by states while article 51 affirms the inherent right of self-defense and grants to states an excuse or limited

privilege justifying what would otherwise be illegal coercion. If a self-defense action is proper, then a state is relieved from responsibility.

Self-defense is distinguishable from self-help and from the concept of aggression. Although self-defense is a form of self-help, self-help is broader than self-defense. Self-help is any and every means by which states pursue their rights and interests; some are legally permissible and some are not. Self-defense is a specific form of self-help, that is, an "affirmation of rights illegally and forcibly denied."[9] Self-help is only legitimate to the extent that the specific form of self-help, such as self-defense, is legal.

Aggression is different from, and irrelevant to, the concept of self-defense. Aggression occurs whenever a state's actions threaten another state in specific ways. Aggression is not limited to force. Aggression can occur in other forms such as economic aggression. Aggression is one of the preconditions for action under article 39 of the Charter for implementation of enforcement actions under chapter VIII. Aggression is not a precondition for action under chapter VII of the Charter, including self-defense in article 51. Article 51 focuses on armed attack and not aggression. As summarized by D. W. Bowett, "in considering whether a situation affords a state the right of self-defence the only relevant concept is that of self-defence; the concept of aggression as it has been elaborated during the course of the last forty years has an entirely different purpose."[10]

It is certainly possible, however, that state misconduct can amount to both an armed attack and aggression. They are not mutually exclusive. The United States has viewed state-sponsored international terrorist acts as armed attacks justifying self-defense—as was the case in the 1986 Libyan raid—or as aggression, as noted by Secretary of State George Shultz:

> A state which supports terrorists or subversive attacks against another state, or which supports or encourages terrorist planning and other activities within its own territory, is responsiblefor such attacks. Such conduct can amount to an ongoing armed aggresion against the other state under international law.[11]

If the attacks conducted by terrorists and their state sponsors are armed attacks, then self-defense in article 51 is the option to consider. If, on the other hand, an act of aggression under article 39 is evident, then the focus is on the enforcement measures under chapter VIII of the Charter.

Conditions Permitting Individual Self-Defense

Several conditions, established in international law, must be satisfied for self-defense to be legally proper. These conditions are interrelated and it is sometimes difficult to draw a clear line between them. Some may be only another way of looking at an essential element of self-defense, but all the conditions taken together depict the essence of the inherent right of individual self-defense.

Preventive, Not Retributive Response

The purpose of self-defense is to preserve the status quo. It is not to punish. This condition distinguishes self-defense from reprisal, a concept to be discussed in chapter 6. Self-defense does not seek the biblical eye for an eye; rather it seeks to preserve world public order which is threatened by permitting the use of force as an emergency measure "strictly confined to the removal of the danger."[12] Thus, a nation acting in self-defense will apply force in a restricted fashion that is regulated in scope and objective. Methods and means, as well as targets, will be carefully selected to achieve the narrow preventive purpose of self-defense and will not be directed in such a manner as to be punitive in character.

Breach of Legal Duty

"The essence of self-defence," writes D. W. Bowett, "is a wrong done, a breach of a legal duty owed to the state acting in self-defence."[13] This condition is consistent with the concept of state responsibility. The breach of a duty alters the legal relationship between states and can justify action in self-defense that would otherwise be illegal.

Protect Essential Rights

Clearly, not all wrongs done a state will justify the use or threatened use of force in self-defense. "International law now forbids the use of force *except* as a counter-measure to an illegality," writes Sir Gerald Fitzmaurice, former judge of the International Court of Justice. He further notes that international law "by no means permits [self-defense] in every case of illegality, but on the contrary, confines it to a very limited class of illegalities only."[14] Other writers are in general agreement that protection of essential rights includes measures of self-defense in response to dangers to territorial integrity or political independence, that is, threats to national security.[15] The assessment that international terrorism is a threat to national security becomes relevant on this count.

What other essential rights are there? Disagreement exists as to the answer to this question. Some scholars and jurists take the position that protection of human life or furtherance of human rights qualifies. Although "there is latitude . . . for national decision-makers to make independent determinations concerning what are a state's essential national interests," states must be aware that "once a decision is made and action based thereon, the community of states will ultimately decide the correctness of the decision."[16]

Clearly, however, states may not resort to self-defense merely to further national interests or aspirations or "to avenge past injustices or to vindicate legal rights."[17] The response of the United Nations to the 1956 Suez intervention is illustrative. "The Members of the United Nations," writes British scholar Rosalyn Higgins,

> were overwhelmingly of the opinion that the proper procedure to guarantee such vital rights was through the various means of peaceful settlement provided by the Charter, and that "the use of force or armed intervention to secure rights, even lawful rights, has been strictly prohibited unless expressly ordered by the Security Council. . . . No country may take the law into its own hands."[18]

Similarly, the nineteenth-century view that self-defense should be equated to self-protection or self-preservation is rejected to-

day.[19] Neither the concept of self-protection nor self-preservation required a prior illegal act or a reaction to actual or threatened violence directed at essential rights; both were destructive of the world legal order inasmuch as they offered justification for any use of force. Writing of self-preservation, British professor of international law James L. Brierly noted "there is hardly any act of international lawlessness which, taken literally, [it] would not excuse."[20] Sorensen reaffirmed Brierly's view by reviewing the use to which self-preservation was put during this century's world wars.

> Full scale invasions have been justified by invoking the right of the state to take measures of self-protection; thus, for instance, the German attack on Luxembourg and Belgium in 1914, and the violation of their permanent neutrality were explained by the invading government as steps that became necessary because of fear of similar moves on the part of France. Anticipation of a breach of neutrality was equally invoked as the justification of German aggression against Norway, Belgium, Holland and Luxembourg in 1940.[21]

In contemporary international law, the concepts self-protection and self-preservation have no legal meaning, while self-defense has a legal basis.

Actual or Imminent Armed Attack

The international community agrees that a right of self-defense against actual armed attack obviously exists. Agreement as to what constitutes an armed attack, however, is another matter. Imminent armed attack centers on whether anticipatory or preemptive self-defense exists.

Self-Defense against Actual Armed Attack. The term *armed attack* is not defined in article 51 of the UN Charter nor was it discussed at the San Francisco Conference.[22] The term is used, however, in article 5 of the North Atlantic treaty. During hearings on that treaty, contemporaneous with the UN Charter, the Senate Foreign Relations Committee commented:

> It should be pointed out that the words "armed attack" clearly do not mean an incident created by irresponsible groups or individuals, but rather

> an attack *by one State upon another*. Obviously purely internal disorders or revolutions would not be considered "armed attack" within the meaning of Article 5. However, if a revolution were aided and abetted by an *outside power* such assistance *might* possibly be considered an armed attack [emphasis supplied].[23]

The first element of armed attack is one state applying force against another state. Consequently, raids by armed bands without state support do not constitute armed attack justifying self-defense.[24] The traditional view is that state toleration or encouragement is an insufficient state connection. "Toleration of armed bands," according to Fordham University law professor Manuel R. García-Mora, "does not warrant the exercise of the right of self-defense."[25] "Insofar as one state merely encourages guerrilla movements within another," writes New York University law professor Thomas M. Franck, "an 'armed attack,' at least in the conventional sense, cannot be said to have taken place."[26] Even though not constituting armed attack justifying self-defense, intervention may be lawful, nonetheless, under some other concept of international law.

In contrast, some scholars see state sponsorship and support as sufficient to sustain a finding of armed attack. Rosalyn Higgins answers affirmatively the question: Can a state subjected over a period of time to border raids by nationals of another state which are openly supported by the government of that state use force in self-defense?[27] A few writers, like Ian Brownlie, fellow of Wadham College and lecturer in international law at Oxford University, require control of the individuals or groups by the sponsoring or supporting state, "but provided there is a control by the principal, the aggressor state, and an actual use of force by its agents, there is an 'armed attack'."[28] The majority, however, look only to sponsorship and support and do not require day-to-day control of the individual or group by the principal. American international law professor and theorist Hans Kelsen writes,

> There are a number of ways in which force may be used indirectly by a state that may be interpreted as constituting armed attack, for exam-

> ple, the arming by a state of organized bands for offensive purposes against another state, the sending by a state of so-called "volunteers" to engage in hostilities with another state, the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state and so on.[29]

Some scholars are uncertain about the issue of control.[30] Others suggest that recognizing a state of armed conflict and presupposing an armed attack would identify and link the responsible state to the terrorist action thereby clarifying the issue of control.[31]

UN practice consistently has been to narrow the application of the right of self-defense, refusing in most situations to accept terrorist acts as armed attack.[32] More recently, a different view was expressed by the International Court of Justice in *Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran)*, where, in more than one place in the judgment, the Court referred to the takeover of the US Embassy as an armed attack on the United States.[33] This opinion should not be considered a new direction in the United Nations but rather a response by the Court to grossly unlawful conduct.

Although the degree of control that a state must exercise over individuals and groups necessary to form the basis of an armed attack may be in dispute (especially in light of UN practice), it is indisputable that both direct and indirect armed attack can serve as a basis for self-defense. Article 51 of the Charter speaks of armed attack and does not restrict it to direct attack. There is no reason to limit self-defense to direct armed attack when, in fact, indirect armed attack can constitute a serious threat. "[A] state's political independence may be jeopardized by such indirect uses of armed force."[34] Recognizing the current state of international relations, Prof John Norton Moore, University of Virginia Law School, concludes that "a state is entitled to respond against aggressive attack, whether that is a direct attack using armies on the march, or whether it is a low intensity conflict or irregular or guerrilla or terrorist attack."[35]

A second element of armed attack is offensive intention. Sorensen describes this element by giving an example. "Regarding intention . . . use of force with no offensive intentions does

not constitute armed attack. For instance, the quarantine established by the United States in connection with the Cuban crisis of 1962 involved the use of force resulting in the deployment of the navy and air force, but it did not amount to an armed attack."[36] Offensive intent appears to be highly subjective and may be more of a legal mechanism to allow states to assess any particular situation politically than it is a strict guideline. Ian Brownlie proposes that the test for offensive intention might be trespass.[37] This approach appears too narrow. Trespass is a property law concept that relates to territorial integrity. However, territory is not the only national security interest of a state that may be protected through exercise of self-defense.

Self-Defense against Imminent Armed Attack. Two schools of thought exist regarding anticipatory or preemptive self-defense in response to imminent armed attack. They are the restrictive and the expansive schools. The restrictive school argues for a narrow interpretation of the UN Charter excluding anticipatory self-defense. Brownlie, Boyle, Jessup, Kelsen, Kunz, Sorensen, and Q. Wright, among others, assert that "there is no right of anticipatory or pre-emptive self-defence."[38] They argue that the exercise of self-defense can take place only, in the words of article 51, "if an armed attack occurs." Absent an armed attack, a state has no right of self-defense. A state can meet preparations for attack only by preparations to resist. "Under the Charter," writes Philip C. Jessup, former judge of the International Court of Justice (ICJ), "alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened."[39] Self-defense provides protection against illegal use of force and nothing more.

Some members of the restrictive school see the advent of modern weapons of mass destruction as permitting an exception to this standard. Writing in 1961 Ian Brownlie suggested that "such relaxation should only be allowed in the case of rockets in flight: if it is extended to fast aircraft and other instruments, the possibilities of abuse of the law increase."[40] To recognize such an exception, however, is to open a Pandora's box. Most restrictionists would

not admit to such an exception. And Brownlie is merely making a suggestion as to what the law should be, not what it is.

Although the phrase "if an armed conflict occurs" seems to lend support to the restrictionist interpretation, the words in article 51 that "nothing in the present Charter shall impair the inherent right of individual or collective self-defense" do not appear to do so. Nor does the San Francisco Conference report of Committee I that considered article 2(4) of the UN Charter. The report contains the statement that "the use of arms in legitimate self-defence remains admitted and unimpaired."[41]

Nonetheless, jurists of the restrictive bent have crafted a legal argument based on the UN Charter's modification of customary international law on self-defense. The most articulate writer in this regard is Hans Kelsen, who argues:

> All sides in this controversy over the scope of the right of self-defense under the Charter have of course appealed to the *travaux preparatoires* [official conference working papers] in support of their respective arguments. But the *travaux preparatoires* are not without a good deal of ambiguity, and for this reason alone the appeal to them can hardly prove decisive. It is true that the Committee which dealt with Article 2, paragraph 4, declared that "the use of arms in legitimate self-defense remains admitted and unimpaired." But this statement merely raises the question as to what was intended by "legitimate self-defense" which was presumably to remain unimpaired. If this statement is read to imply the preservation of the customary right of self-defense, it is not easy to square with the terms of Article 2, paragraph 4. Nor is it easy—considering the notorious vagueness of the customary right of self-defense—to reconcile with the intent to impose strict limits on the measures of self-help permitted to member states. It should also be noted that the same Committee went on to declare that the use of force "remains legitimate only to back up decisions of the Organization at the start of a controversy or during its solution in the way that the Organization itself ordains."[42]

Ian Brownlie argues "that Article 51 is not subject to the customary law and that, even if it were, this customary right must be regarded in the light of State practice up to 1945."[43] According to Brownlie, by 1945, state practice had evolved to the point where the nineteenth-century, customary-law view of self-defense as an unlimited right equated to self-protection had been replaced by a limited right of self-defense much the same as that

memorialized in the Charter.[44] Therefore, the issue of whether customary law or the Charter provides the standard for self-defense is moot because both are essentially the same.

In addition to legal arguments, the restrictionists have suggested several policy reasons why anticipatory self-defense should not be admitted. First, determining with certainty that an armed attack is imminent is extremely difficult. An error in judgment could lead to an unnecessary conflict. Second, anticipatory self-defense is akin to the rejected nineteenth-century concept of self-preservation. This form of self-defense would permit states to use force in situations other than actual armed attack. Third, anticipatory self-defense is grounded in customary law, which provides no clear guidelines for application. The oft-cited *Caroline* case is more words than substance.[45] Rosalyn Higgins believes the United Nations has opted for the restrictive approach for policy reasons, that "there has merely been a reluctance on the part of the United Nations to encourage [anticipatory self-defense] for fear that it may be too fraught with danger for the basic policy of peace and stability."[46]

The expansive school's belief that article 51 permits the exercise of anticipatory self-defense in response to imminent armed attack is the predominant theory today. Bowett, Farer, Harlow, Higgins, McDougal, Schachter, Lohr, and Waldock are members of this school.[47] According to US Navy judge advocate Capt James L. J. McHugh, "states have consistently acted on this basis."[48] The United States has adopted this view.[49] Secretary Shultz has affirmed that it "is permitted to use force to preempt future attacks, to seize terrorists, or to rescue its citizens when no other means are available."[50] In his letter of 16 April 1986 to Congress on the Libyan raid, President Ronald Reagan advised that "these strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter. This necessary and appropriate action was a preemptive strike, directed against the Libyan terrorist infrastructure and designed to deter acts of terrorism by Libya."[51]

Four basic arguments in favor of anticipatory self-defense have been advanced. First, if an attack is being mounted, then it can be said to have begun. Second, article 51 does not restrict the

inherent right of self-defense as contained in customary international law. Third, nuclear war and other weapons of modern technology make it impossible to wait for the first strike. Fourth, and finally, a narrow reading of article 51 will only benefit aggressors.[52] A brief consideration of each of these arguments will assist in understanding what anticipatory self-defense is really all about.

The first argument is based upon an interpretation of the Charter language. It finds anticipatory self-defense consistent with that instrument. Article 2(4) requires member states to refrain not only from the use of force but also from the threat of force. The Charter system was designed to manage both actual use and imminent threat of force. If states had to wait for an armed attack to occur, then maintenance of international peace and security as contemplated in article 51 could not take place. Rather, states would be left with efforts to restore, not maintain, international peace and security. Article 51 preserves unimpaired the inherent right of self-defense, which means the customary international law concept of self-defense to include anticipatory or preemptive self-defense. The phrase "if an armed attack occurs" has been misunderstood by the restrictionists. The French text of the UN Charter, equally authentic to the English text, does not use the phrase "if an armed attack occurs." Instead the French text reads, "*dans un cas où un Membre des Nations Unies est l'objet d'une agression armée*," which translates, "in a case where a Member of the United Nations is the object of armed aggression."[53] Moreover, Yale University law professor Myres McDougal has focused on an important linguistic problem in interpreting the phrase "if an armed attack occurs." He writes,

> A proposition that "if A, then B" is *not* equivalent to, and does *not* necessarily imply, the proposition that "if, and only if A, then B." To read one proposition for the other, or to imply the latter from the former, may be the result of a policy choice, conscious or otherwise, or of innocent reliance upon the question-begging Latinism *inclusio unius est exclusio alterius* [the inclusion of one is the exclusion of the other]; such identification or implication is assuredly not a compulsion of logic. If a policy choice is in fact made, it should be so articulated as to permit its assessment.[54]

McDougal does not believe that the phrase should be read to mean "if and only if an armed attack occurs" then self-defense is permissible.

Those who support anticipatory self-defense do not believe that it justifies the use of force in response to mere preparation by an enemy. More of a nexus than that is required between the threat and potential use of force. The generally accepted test is that "anticipatory self-defense is applicable only when there is a clear and present danger of an imminent attack."[55] In defense of this approach, Oscar Schachter, Columbia University law professor and former president of the American Society of International Law, writes, "It is important that the right of self-defense should not freely allow the use of force in anticipation of an attack or in response to a threat. At the same time, we must recognize that there may well be situations in which the imminence of an attack is so clear and the danger so great that defensive action is essential."[56]

The second argument focuses on customary international law finding that "the right of self-defense belongs to member states not by grant under the Charter, but by virtue of a pre-existing customary and natural right long recognized by international law."[57] The argument is based on the premise that "the Members of the United Nations when exercising their inherent powers do so not by grant but by already existing right. The Charter limits the sovereign rights of the states; it is not a source of those rights."[58] In short, what the Charter does not forbid, states possess.

Not only does article 51 make reference to the unimpaired and inherent right of self-defense, but the negotiating history of the Charter, contained in the records of the San Francisco Conference, supports the position that the customary international law concept of self-defense be preserved. At the Inter-American Conference on 3 March 1945 the Act of Chapultepec was signed establishing a collective defense system. There was concern among the delegates to the San Francisco Conference that the UN Charter might adversely affect this relationship. Article 51 was drafted to clarify this issue. Originally it was proposed that the article be placed in chapter VIII of the Charter, which would have limited

the right of collective self-defense to regional organizations and would have required prior approval by the Security Council. In the debate that ensued, the delegates intended clearly that the customary right of self-defense not be altered. As a result article 51 was moved from chapter VIII of the Charter to chapter VII.[59] D. W. Bowett writes,

> The connection between [the Act of Chapultepec] and the introduction of Article 51 was stated quite clearly by the Colombian delegate, Camargo, at the 4th Meeting on May 23rd, 1945 [at the San Francisco Conference] . . . "it may be deduced that the approval of this action [moving Article 51 from Chapter VIII to Chapter VII] implies that Chapultepec is not in contravention of the Charter."[60]

Preserving the customary right of self-defense has been a consistent position of the United States. When negotiating the Kellogg-Briand Pact,[61] which served as a precursor to the UN Charter, the United States sent a note to France on 23 July 1928 regarding the draft pact that read in part, "There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-defence."[62] France never objected to this interpretation. James L. Brierly summed up the view of scholars thusly, "self-defence is a natural right not touched by the Pact."[63]

What is the customary law on self-defense? Some international law scholars believe that the answer can be found in the *Caroline* case.[64] During the 1837 Canadian insurrection, a group of Americans was assisting the rebels with supplies and communications provided by the ship *Caroline*. While the vessel was anchored on the US side of the border, an armed band under the command of a British officer crossed the river, set fire to the vessel, and cut it loose to float over Niagara Falls. The US government protested this action to the British government, which responded, in part, that it had exercised its right of self-defense. Replying to Lord Ashburton, Secretary of State Daniel Webster set down in a note of 6 August 1842 his test for self-defense as requiring a necessity that "is instant, overwhelming, and leaving no choice of means, and no moment for deliberation." This test as a measure of what constitutes imminent attack may have been valid for the

nineteenth century, but some scholars now believe that the test has been modified in light of modern weapons technology.[65]

This modification allows these scholars to make a third argument in favor of anticipatory self-defense. Only anticipatory self-defense is responsive to the nature of modern weapons, including nuclear weapons. To wait for an actual armed attack to occur would be insanity. Underlying this argument is a plea for common sense in interpreting the Charter. To narrowly read the Charter as not permitting anticipatory self-defense, writes Myres McDougal, would be to engage in "a serious underestimation of the potentialities . . . of newer military weapons systems."[66] Or as Prof Thomas M. Franck more pointedly notes, "If . . . what the Charter requires [is that a nation await an actual nuclear strike against its territory], then, to paraphrase Mr. Bumble, the Charter is 'a ass'."[67] Clearly, the problem is not limited to nuclear weapons but it involves a whole generation of new weapon systems. The Israelis learned in the 1967 war that if you wait for the first hit, then it is too late. The Israeli destroyer *Eilat* waited and was destroyed by Styx missiles from an Egyptian patrol boat. The use of Exocet missiles in the Falklands conflict reaffirmed that lesson.

Some commentators do not see the Charter as the issue. Instead they see the test expounded in the *Caroline* case as too strict.[68] There are two responses to this concern. One is to acknowledge that the test is too strict but to add that it has never been accepted in state practice in a strict form. Lord Ashburton did not accept the Webster formula. In his note of reply he simply offered a perfunctory British apology for the incident. A second response is to focus on the formula's interpretative latitude. The test contains verbal guidance that must be applied to a particular factual circumstance through the exercise of judgment. The nature of the weapons threat is a proper factor to consider as part of necessity, immediacy, choice, and opportunity for deliberation. Judging a potential nuclear threat is equally appropriate. But the world community is likely to hold the acting state to a high standard if the international reaction to the Israeli raid on the Iraqi Osirak nuclear reactor is any indication.[69]

The fourth and final argument for anticipatory self-defense is that a restrictionist interpretation of the Charter will benefit aggressors. A purpose of the Charter is to prevent acts of aggression, not foster them. As Sir Humphrey Waldock, former president of the International Court of Justice, writes, "It would be a travesty of the purposes of the Charter to compel a defending state to allow its assailant to deliver the first and perhaps fatal blow. . . . To read Article 51 otherwise is to protect the aggressor's right to the first stroke."[70]

Self-Defense against Accumulation of Events. The general rule of international law is that sporadic or isolated incidents by armed groups (even with state support) do not constitute armed attack. Consequently, it has proven difficult to characterize international terrorist acts as armed attack. Theories have been proposed from time to time to view terrorist acts as an interrelated set of occurrences. In 1956 Israel sought to justify its military action across the UN armistice line based upon a continuing attack by fedayeen. The United Nations and the United States rejected this analysis in large part because Israeli action was contrary to a UN supervised armistice.[71] More recently, however, Israeli scholars have articulated a persuasive analysis of the problem in the form of the accumulation-of-events theory.

Yehuda Blum, Israeli ambassador to the United Nations from 1978–84 and currently professor of international law at the Hebrew University in Jerusalem, is among its chief spokesmen. He writes,

> Obviously, one would have to treat an isolated terrorist act emanating from the territory of one state and carried out on the territory of another differently from an act of terrorism which constitutes but one link in a long chain of such acts.[72]

Although individually a terrorist act may not be an armed attack, the totality of such acts may suggest otherwise. This is the accumulation of events.

This theory has been accepted in United States practice. The pattern-of-events approach was used, for example, as part of the legal argument for US participation in Vietnam—the Gulf of Tonkin Resolution—and for the US incursion into Cambodia in May 1970. The "ongoing pattern of attacks by the Government

of Libya'' served as a basis for the 15 April 1986 raid against that country.[73] Israel used the theory to support its action in March 1962 in the Lake Tiberias incident and again in November 1966 in the Samu incident. The United Kingdom relied on the theory for its actions against Yemen in 1964 as did Portugal in its action against the Senegalese village of Samine in November–December 1969.[74] The International Law Association's American branch concluded in its 1985–86 report that ''`defensive retaliation' may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action.''[75]

Timely Response

Self-defense contains a temporal element. It is limited by time. A response in self-defense must be made close in time to the actual attack or threat. Otherwise, self-defense could justify countless reprisals to prior unlawful acts of force or remote future contingencies. This element of timeliness was emphasized in the *Caroline* test, which requires that the response be instant, that is, immediate, now, not later. Since proximity in time is a critical factor, a state can lose its right to self-defense if it waits too long. How long is too long is a matter of judgment based upon the factual circumstances. For example, if an armed aircraft is fired upon, then it might be expected that it would exercise the right of self-defense immediately by making a response. If, however, an unarmed aircraft were fired upon, then it may be appropriate for the self-defense response to await the arrival on scene of an armed aircraft, provided that aircraft were sent with due dispatch.[76]

Last Resort

Article 2(3) mandates that states ''settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.'' Article 33 of the Charter requires that ''the parties to a dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all, seek a solution [by]

peaceful means."[77] These obligations require states to exhaust peaceful means before resorting to self-defense. In the words of Rutgers University professor of law Tom J. Farer, "there must not be alternative means of protection."[78]

The state facing harm does not need to exhaust peaceful means of settlement if undertaking such efforts will prove fruitless. Also, if a state is under attack, it then has the right to respond with force to meet force in self-defense. If an armed attack is in progress or imminent, then the situation may preclude seeking peaceful settlement. But an entirely different situation prevails if the armed attack has occurred and no future attack is imminent.[79] Use of force is not required to defend against further armed attack as no such threat exists any longer.

Necessity of Response

Many writers see necessity as a requirement for exercising self-defense.[80] In reality necessity is nothing more than a combination of elements previously discussed. Necessity arises when factors of time and absence of other effective remedies merge. Necessity has been described as "great and immediate," "direct and immediate," "compelling and instant," and "irreparable and imminent."[81] Schachter sees necessity in this way:

> The requirement of "necessity" for self-defense is not controversial as a general proposition. However, its application in concrete cases requires assessments of the facts and intentions which in turn involve diverse perceptions. The subjectivity of such judgments may be seen as reducing the legal value of the requirement. This may well be so but it should not lead to the conclusion that a judgment of necessity is entirely subjective. A case of self-defense is not persuasive either on the political or legal level unless a reasonable basis of necessity is perceived.[82]

As preconditions of necessity, Schachter finds that there must be both an imminent danger and no other available peaceful solution.[83] If either does not exist, then neither does necessity. One might also conclude that the primary thrust of the *Caroline* test is necessity.

Proportionality of Response

Two kinds of proportionality are required. First, the response must be proportional to the delict or wrong suffered. It would undoubtedly be disproportionate to invade and occupy large portions of another state's territory or indiscriminately and directly make its cities the object of attack because it provided support or sponsorship to international terrorists. Yet, it may well be proportionate to strike terrorist camps and supporting infrastructure located within that country.[84]

Second, the response must be proportional in terms of the nature and the amount of force employed to achieve the objective or goal. This stricture does not mean that the state exercising its right of self-defense must limit its use of force strictly to the minimum required to achieve the objective or goal. States have discretion in this regard. They have leeway to plan successful military operations that can, and usually do, include the commitment of sufficient (not minimum) force necessary to accomplish the task. Also, if the delictual state resists the self-defense efforts of the injured state with additional force, then the injured state may be justified in increasing its force accordingly and an escalation may result.[85]

Although self-defense is usually taken against the source of armed attack or threat, it is not unreasonable, writes Oscar Schachter, for "a state to retaliate beyond the immediate area of attack, when that state has sufficient reason to expect continuation of attacks."[86] Schachter points out that such retaliation would not amount to anticipatory self-defense because the response would be to an armed attack that already has occurred.

The basic requirement of proportionality is that the self-defense action be strictly confined to removal of the danger. Action taken beyond the provocation will not be in self-defense but rather will constitute illegal peacetime reprisal. Factors to be considered in determining proportionality are the essential rights threatened; the military force and anticipated resistance of the delictual state; and the scope, nature, amount, and intensity of the force applied by the injured state in self-defense to include, for example, the scale of weaponry, the size and composition of the force, the targets selected, and the extent of collateral civilian damage and injury.[87]

The proportionality requirement has received attention only in the last 25 years. Previously, self-defense actions had involved small forces that faced little or no resistance and whose mission was of limited duration causing few if any civilian casualties. Also, media coverage was not live, instantaneous, and far-reaching. Today, nations worry about proportionality. Secretary of State George Shultz described the April 1986 Libyan raid as "proportionate,"[88] and Secretary of Defense Caspar Weinberger described targets hit and weapons used in order to affirm this position. Weinberger noted that precision-guided munitions had been used to improve accuracy and that

> all the targets were terrorist-related and the criteria for selecting the targets was that they had a full terrorist connection; that we would minimize any collateral damage from civilian or other facilities nearby; that we would have full consideration for the safety of the pilots as a major consideration; and that they would be good night targets in the sense that they had good outlines that could be reflected on the radar and not mistaken for other targets.[89]

Weinberger denied that Colonel Qadhafi was, himself, a target.

Reasonable Response

This element requires an overall assessment that demands a bringing together of all of the elements of self-defense to determine if the contemplated response is appropriate. The *Caroline* formula holds that self-defense actions must be neither unreasonable nor excessive. That test may be stated as follows: the injured state is authorized to act unilaterally with armed force in self-defense when it reasonably judges, considering all relevant elements, that it may do so. The injured state initially makes this judgment based upon the best information available to it at the time.[90]

States Must Report Response

Article 51 requires that measures taken in self-defense be reported immediately to the Security Council. States are also obligated to report any preparatory actions to the Security Coun-

cil; they do not have to report their actions to any other body or organ of the United Nations other than the Security Council. Reports to the General Assembly or any of its committees or to the secretary general are not required.[91]

This obligation to report self-defense actions gives the Security Council the opportunity to act and to judge the actions of the delictual and injured states. More frequently than not, the Security Council focuses attention on the actions taken in self-defense by the injured state because they usually appear to precipitate the crisis and because a determination of the viability of the self-defense claim generally will dispose of the entire affair.

Following World War II, the victorious allied nations set down the rule at the Nuremberg International Military Tribunal that "whether action taken under the claim of self-defense was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."[92] That rule has been carried over into the UN Charter. A state may make the initial decision invoking the right, but the final decision must be made by an international body.[93] In accordance with article 51, this determination would be made by the Security Council. But because of its voting rules, the Council, in practice, has been precluded from doing so. The General Assembly, which possesses recommendatory powers only, has assumed this responsibility. Although the General Assembly cannot direct or mandate a course of action to the parties involved in the crisis, if the vote significantly represents the universal interests of the world community it can have a substantial effect.[94] Secretary Shultz summed it up when he said, "Governments that overreact, even in self-defense, may only undermine their own legitimacy, and they unwittingly serve the terrorists' goals."[95]

Response Must Cease If Security Council Acts Effectively

Article 51 authorizes self-defense only "until the Security Council has taken measures necessary to maintain international peace and security." Self-defense, therefore, is an interim mechanism that must be terminated when, but only when, the Security Council

takes effective, positive, and affirmative action. A Security Council veto of proposed measures would result in Security Council inaction. Ineffective action or inaction on the part of the Council is not sufficient to end a state's right of self-defense. As D. W. Bowett writes,

> whether the necessary measures have been taken must be determined objectively, as a question of fact, and that both the [Security Council] and the defending state are able to reach their own decisions on this. Should these decisions conflict then the individual member admittedly runs the risk of its continued action being characterized as a "threat to the peace, breach of the peace, or act of aggression" under [Article 39], but this is only a somewhat greater hazard than it runs in any event by resorting to self-defence and would probably be undertaken in preference to annihilation by the attacking state.[96]

The right of self-defense is unique. Prior Security Council approval is not required before a state can resort to its use (in contrast to regional enforcement actions under chapter VIII of the Charter) and, if Security Council action on proposed measures is blocked by veto, then the right of continued self-defense remains unimpaired.[97] In short, states retain the right of self-defense so long as the United Nations Organization through the Security Council is unable or unwilling to deal with the situation giving rise to the self-defense action in the first place.

Summary and Transition

Individual self-defense, including anticipatory self-defense, can be a legal justification for the use of armed force. Self-defense must satisfy eleven conditions or requirements if the action is to be legitimate. All eleven conditions are interrelated and *all must be satisfied.*

In determining the propriety of asserting self-defense certain ambiguities, problems of interpretation, and difficulties of factual application arise. Also, as Yale University law professor Eugene V. Rostow has observed, "Article 51 is one of the worst drafted sentences in history."[98] Yet, one must agree with Columbia University law professor Oscar Schachter that the doctrine of self-defense has a core meaning that permeates all of its

essential conditions.[99] The core meaning of the doctrine of self-defense makes it generally possible, in any particular circumstance, to judge whether an action is truly in self-defense.

Some jurists and scholars may require more certainty. However, as British international lawyer Ian Brownlie has observed, "Those who demand the perfect definition present an attitude of mind more suited perhaps to the design of precision instruments than the making or formulation of legal rules."[100] Human activity cannot be regulated in the same manner or to the same degree as the laws of science regulate time.

Chapter 5 continues the discussion of self-defense by looking at collective self-defense as a legal justification for states acting together. Chapter 5 also reviews the legal basis for other combined state action at the regional level—regional enforcement and peacekeeping actions.

NOTES

1. Hugo Grotius, *prolegomera* [prologue], *De Jure Belli ac Pacis*, Libri Tres [the law of war and peace], trans. F. Kelsey, Classic of International Law, no. 3 (Oxford, England: Carnegie Endowment for International Peace, 1925), 172.

2. D. W. Bowett, *Self-Defense in International Law* (New York: Frederick A. Praeger, 1958), 3. See also John C. Bender, "Self-Defense and Cambodia: A Critical Appraisal," *Boston University Law Review* 50 (Spring 1970): 139.

3. Abraham D. Sofaer, "Terrorism and the Law," *Foreign Affairs* 64, no. 5 (Summer 1986): 922.

4. See chapter 3 for a discussion of UN Charter, article 2(4). See also Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States," *American Journal of International Law* 64, no. 4 (October 1970): 809–37; Rosalyn Higgins, "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice," in *British Year Book of International Law, 1961*, vol. 37 (Oxford, England: Oxford University Press for Royal Institute for International Affairs, 1962), 299; W. Michael Reismann, editorial comment, "Coercion and Self-Determination: Construing Charter Article 2(4)," *American Journal of International Law* 78, no. 3 (July 1984): 642–45; and Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April–May 1984): 1620–26.

5. "Charter of the United Nations," art. 51, 26 June 1945, *Statutes at Large*, vol. 59:1031; *United States Treaty Series* (TS) 993; Department of State, *Treaties and Other International Agreements, 1776–1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 3, *Multilateral, 1931–1945*, 1153; "Charter of the United Nations: Amendments to Articles 23, 27, and 67," 31 August 1965, *Treaties and Other International Acts Series* (TIAS) 5857, *United States Treaties and Other International Agreements* (UST), vol. 16, pt. 2, 1134; United Nations Treaty Series (UNTS), *Treaties and Other International Agreements Reported and Filed or Recorded with the Secretariat of the United Nations*, vol. 557 (1966), no. 8132, 143; "Charter of the United Nations: Amendments to Article 109," 12 June 1969, TIAS 6529, UST, vol. 19, pt. 5, 5450; "Charter of the United Nations: Amendments to Article 61," 24 September 1973, TIAS 7739, UST, vol. 24, pt. 2, 2225.

6. "UN Charter," art. 2(7) reads:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

See also Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 57; and Sofaer, "Terrorism and the Law," 919–20.

7. See Bowett, 269; and Tom J. Farer, "Law and War," chap. 2 in *The Future of the International Legal Order*, vol. 3, *Conflict Management*, ed. Cyril E. Black and Richard A. Falk (Princeton, N.J.: Princeton University Press, Center for International Studies, 1971), 29.

8. Max Sorensen, *Manual of Public International Law* (New York: St. Martin's Press, 1968), 541. See also Matt S. Nydell, "Tensions between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor," *Virginia Journal of International Law* 24, no. 2 (1984): 466.

9. Higgins, 298. See also Bowett, 269; John R. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality under International Law," *Virginia Journal of International Law* 21, no. 3 (1981): 517; and Oscar Schachter, "In Defense of the International Rules on the Use of Force," *University of Chicago Law Review* 53, no. 1 (Winter 1986): 126, n. 62.

10. Bowett, 261–62. See also Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Netherlands: Martinus Nijhoff, 1962), 118.

11. Sofaer, "Terrorism and the Law," 920.

12. See Bender, 131; Bowett, 20; Farer, 28; Hans Kelsen, *Principles of International Law*, 2d ed., rev. and ed. Robert W. Tucker (New York: Holt, Rinehart and Winston, 1966), 65; and Capt Samuel R. Maizel, USA, "Intervention in Grenada," *Naval Law Review* 35 (Spring 1986): 71.

13. Bowett, 9. See also Farer, 28; and Lt Comdr Bruce Harlow, USN, "The Legal Use of Force . . . Short of War," US Naval Institute, *Proceedings* 92, no. 11 (November 1966): 92.

14. Sir Gerald Fitzmaurice, "The Foundations of the Authority of International Law and the Problem of Enforcement," *Modern Law Review* 19 (1956): 1.

15. See Bowett, 20 and 259; Farer, 28; Higgins, 315; and Kelsen, 75.

16. Lt Comdr Michael Franklin Lohr, USN, "Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism," *Naval Law Review* 34 (1985): 23.

17. Schachter, "International Rules," 120. See also Lohr, 19.

18. Higgins, 315.

19. See Ian Brownlie, "The Use of Force in Self-Defence," in *British Year Book*, vol. 37:223; Kelsen, 59–61; Harlow, 92; and James J. McHugh, "Forcible Self-Help in International Law," *US Naval War College International Studies* 62 (1980): 143.

20. James L. Brierly quoted by Bowett, 10.

21. Sorensen, 761.

22. See Brownlie, 244–45; and Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 12, ed. Marjorie M. Whiteman (August 1971), 51 and 229–30, State Department, 8586.

23. Brownlie quoting the Senate Foreign Relations Committee, 245.

24. See J. E. S. Fawcett, "Intervention in International Law: A Study of Some Recent Cases," *Recueil des Cours* 103, pt. 2 (1961), 361–63; Victoria Toensing, "International Law and Activities of Armed Bands," *International and Comparative Law Quarterly* 7 (1958): 731; and *Digest of International Law*, vol. 12:46–51.

25. García-Mora, 118–19.

26. Franck, 812.

27. See Higgins, 301.

28. Ian Brownlie, *International Law and the Use of Force by States* (Oxford, England: Oxford University Press, 1963), 373. See also Bowett, 56; Brownlie, "Use of Force," 260; and Sorensen, 777.

29. Kelsen, 62–63. See also Schachter, "In Defense of International Rules," 137; Abraham D. Sofaer, "Fighting Terrorism through Law," address before American Bar Association, 15 July 1985, in *Terrorism*, ed. Steven Anzovin, The Reference Shelf, vol. 58, no. 3 (New York: H. W. Wilson Co., 1986), 142–52; reprinted from *Department of State Bulletin* 85, no. 2103 (October 1985). See also *Digest of International Law*, vol. 12:229–30.

30. See Brownlie, *International Law and Force*, 278–79; and Farer, 30.

31. See George Kennan's comments as quoted by Edward A. Lynch, in "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 79.

32. See, for example, Sorensen, 777.

33. See Concerning United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), merits, 1980 International Court of Justice (ICJ), paras. 17, 24, 25, 57, and 91.

34. Kelsen, 70.

35. John Norton Moore, "International Law and Terrorism," *ROA National Security Report* 4, no. 10 (October 1986): 11. See also Farer, 42; and *Digest of International Law*, vol. 12:28–29, 63, and 228–29.

36. Sorensen, 778.

37. Brownlie writes: "Since the phrase 'armed attack' strongly suggests a trespass it is very doubtful if it applies to the case of aid to revolutionary groups and forms of annoyance which do not involve offensive operations by the forces of a State." Brownlie, "Use of Force," 245. See also García-Mora, 113.

38. As Brownlie has stated, "It can only be concluded that the view that Article 51 does not permit anticipatory action is correct and that the arguments to the contrary are either unconvincing or based on inconclusive pieces of evidence." Brownlie, "Use of Force," 244. Francis A. Boyle comments that "despite assertions of the Israeli Government to the contrary, the regressive doctrine of anticipatory or pre-emptive self-defense has not survived under the regime of the United Nations Charter." Boyle, "Upholding International Law in the Middle East," in *Terrorism, Political Violence and World Order*, ed. Henry Hyunwook Han (Lanham, Md.: University of America, 1984), 512; Philip C. Jessup observes that "the effect of Article 51, however, is to limit the right of employing force in self-defense to the one case of a prior armed attack. [The Charter] forbids the taking of anticipatory measures." See Jessup, *A Modern Law of Nations*, vol. 1 (New York: Macmillan Co., 1948), 166; Kelsen, 66–67; Josef Kunz asserts that "the threat of aggression does not justify self-defense under Article 51. . . . The imminent armed attack does not suffice under Article 51." Kunz, "Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations," *American Journal of International Law* 41 (1947): 878. Sorensen (p. 778) argues that "there is no right to the first or anticipatory strike." Quincy Wright notes, "It appears that the Charter intended to limit the traditional right of defense by states to actual armed attack." Q. Wright, "The Cuban Quarantine," *American Journal of International Law* 57, no. 3 (1963): 560. See also the report of the American Bar Association, Section on International Law and Practice, Committee on Grenada, "International Law and the United States Action in Grenada," *International Lawyer* 18 (1984): 266–67. The committee report concludes, "The reference in Article 51 to an 'armed attack' appears to represent an unqualified condition, and [has been] interpreted as a limitation upon whatever 'inherent right' a state otherwise possesses."

39. Jessup, 166.

40. Brownlie, "Use of Force," 259. However, a contrary argument is made in "Report of the Committee on the Use of Force in Relations among

States," in American Branch, International Law Association, *1985–86 Proceedings and Committee Reports* (New York: International Law Association, American Branch, 1986), 203. This report reads:

> In response to this line of reasoning, others argue that the existence of nuclear missiles has made it even more important to maintain a legal barrier against preemptive strikes and anticipatory defense. It is conceded by them that states facing an imminent threat of attack will take defensive measures irrespective of the law, but it is preferable to have states make that choice governed by necessity than to adopt a principle that would make it easier for a state to launch an attack on the pretext of anticipatory defense.

41. See Bowett, 182.
42. Kelsen (pp. 69–70, n. 64) also notes that

> with respect to Article 51, attention is frequently called to the fact that this provision was inserted in the Charter to accommodate regional security arrangements—particularly the inter-American system then foreshadowed by the Act of Chapultepec—with the highly centralized system of the Charter. Article 51 guaranteed the members such an arrangement that, in the absence of Security Council intervention, because of the veto, the members of a regional security arrangement—or, for that matter, a mutual assistance pact—would nevertheless have the right to come to the collective defense of an attacked state. From this history the conclusion is often drawn that Article 51 was not intended to narrow further the customary right of self-defense but only to make quite clear that nothing in the Charter precluded a right to use force in self- or collective defense in the absence of effective Security Council intervention and therefore that the words "if an armed attack occurs" merely emphasize one contingency with which the drafters were particularly concerned. If this is true, the wording of Article 51 betrays a curious way of realizing this alleged intent, despite the ingenious suggestion that the word "if" should be read as an hypothesis rather than a condition.

43. Brownlie, "Use of Force," 241.
44. Ibid., 195–96.
45. Ibid., 227–28.
46. Higgins quoted in *Digest of International Law*, vol. 12:62.
47. See Bowett, 188; Farer, 32; Harlow, 93–94; and Higgins, 299–302. Lohr (p. 18) writes,

> The negotiating history at the San Francisco Conference reveals that Article 51 was intended to incorporate the entire customary law or "inherent right" of self-defense. . . . Accordingly, the "inherent right" of self-defense, representing the incorporation of customary right, includes reasonable and necessary anticipatory self-defense.

Myres S. McDougal also supports this position, noting that

> there is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional rights of states.

McDougal, "The Soviet-Cuban Quarantine and Self-Defense," *American Journal of International Law* 57, no. 3 (July 1963): 599; Oscar Schachter writes, "In short, under existing law an armed attack is a basic condition of legitimate self-defense. That requirement may be reasonably construed to include both

imminent attack (as defined earlier) and indirect attacks." Schachter, "International Rules," 141. See also Sir Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours* 81, pt. 2 (1952): 497–98.

48. McHugh, 150.

49. See, for example, *US Navy Regulations, 1973*, article 0915, which recognizes an inherent right to "counter either the use of force or an immediate threat of the use of force" and Department of the Air Force, Office of The Judge Advocate General (HQ USAF/JACI), letter, subject: Use of Force against Terrorist Organizations and Personnel, 24 January 1985, para. 3. This letter reads:

> The U.S. position has always been that Article 51 of the UN Charter does not create a new principle, but rather reiterates the inherent right of self-defense customarily recognized by international law. As such, the right of self-defense is not limited to responding to an actual armed attack but also includes preemptive or anticipatory self-defense.

50. George P. Shultz quoted in *New York Times*, 16 January 1986, 8. Lt Col James P. Terry, USMC, writes: "However, elimination of the threat of future attacks by terrorists from those camps in the deliquent states could be more effectively justified under the rationale of anticipatory self-defense." Terry, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May–June 1986): 65.

51. President Ronald Reagan's letter to Congress, 16 April 1986, quoted in "US Exercises Right of Self-Defense against Libyan Terrorism," *Department of State Bulletin* 86, no. 2111 (June 1986): 8. According to Abraham D. Sofaer, "In the April 14 operation against Libya, U.S. forces undertook military action in self-defense against five terrorist-related targets in order to preempt and deter Libya's unlawful aggression through terrorist force against the United States and its nationals." Sofaer, "The War Powers Resolution and Antiterrorist Operations," *Department of State Bulletin* 86, no. 2113 (August 1986): 70.

Great Britain has supported this legal interpretation. As reported by James M. Perry: "The only question her government asked, she said, was whether the attack was legal under Article 51 of the United Nations Charter and under international law. She said her lawyers advised her the attack was self-defense and therefore legal. Once that determination was made, the U.S. was cleared to send the jets on their way." Perry, "Thatcher Draws Harsh Criticism by Labour, European Allies for Sanctioning Libya Strike," *Wall Street Journal*, European edition, 16 April 1986, 4. By a vote of 79–28 the United Nations General Assembly voted to condemn the United States action as violative of international law. See "What's News," *Wall Street Journal*, 21 November 1986, 1.

52. See *Digest of International Law*, vol. 12:49–50.

53. See James L. Brierly, *The Law of Nations*, 6th ed., ed. Sir Humphrey

Waldock (New York: Oxford University Press, 1963), 419–20; and remarks of Prof W. Thomas Mallison, in American Society of International Law, *Proceedings of the 77th Annual Meeting*, 14–16 April 1983 (Washington, D.C.: 1985), 176.

54. McDougal, 600.

55. See Headquarters USAF/JACI ltr, para. 4.

56. Schachter, "The Right of States," 1634.

57. Harlow, 93.

58. See Bowett, 185.

59. See Brierly, 416–19; and *Digest of International Law*, vol. 12:1–2.

60. Bowett, 183.

61. "Pact of Paris" (Kellogg-Briand Pact), 27 August 1928, *Statutes at Large*, vol. 46:2343; League of Nations Treaty Series (LNTS), vol. 94:57.

62. 23 July 1928 note quoted in Brownlie, "Use of Force," 206. For text, see also William W. Bishop, Jr., *International Law: Cases and Materials*, 2d ed. (Boston: Little, Brown and Co., 1962), 776–77.

63. Brierly, 410.

64. For a discussion of the *Caroline* case, see Bishop, 777.

65. Bowett, 187–92; Higgins, 299; Nydell, 485–86.

66. Myres McDougal quoted by Lt Col Uri Shoham, Israeli Air Force, "The Israeli Aerial Raid upon the Iraqi Nuclear Reactor and the Right of Self-Defense," *Military Law Review*, no. 109 (1985), 199, n. 143.

67. Franck, 820. See also George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review* 39, no. 3 (May–June 1986): 69–80; and Nydell, 488–90.

68. See Maizel, 72–73; W. Thomas Mallison, "Limited Naval Blockade or Quarantine—Interdiction: National and Collective Defense Claims Valid under International Law," *George Washington Law Review* 31 (1962): 348; and Schachter, "International Rules," 135–36.

69. See Maizel, 47–86; and Shoham, 199–223.

70. See Waldock, 497–98. See also Bender, 134–35.

71. See Farer, 65.

72. Yehuda Z. Blum, "State Response to Acts of Terrorism," in *State Terrorism and the International System*, Proceedings of the International Security Council, Tel Aviv, Israel, 26 January 1986 (New York: CAUSA International, 1986), 46. See also *Terrorism: How the West Can Win*, ed. Benjamin Netanyahu (New York: Farrar, Straus, and Giroux for the Jonathan Institute, 1986), 136.

73. See statement of Ambassador Herbert S. Okun, acting US permanent representative to the United Nations, in "Self-Defense against Terrorism" (US *Digest*, chap. 14, sec. 1), Contemporary Practice of the United States Relating to International Law, *American Journal of International Law* 80, no. 3 (July 1986): 632–33. See remark of Julia Willis, deputy assistant legal adviser for European Affairs, Department of State, on 16 February 1979:

> It is clear that the United States recognizes that patterns of attack or infiltration can rise to the level of an "armed attack" thus justifying a responding use of force in the exercise of the right of self-defense. The United States made this determination both in its legal defense of the United States participation in the Viet Nam war, and in the Cambodian incursion of May, 1970.

Quoted in Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1979*, ed. Marian Lloyd Nash (Washington, D.C.: 1983), 1751, State Department, 9374.

74. See Bowett, 9–10.

75. "Committee on the Use of Force," 207.

76. See Bender, 134; Bowett, 53; Higgins, 298; Kelsen, 80; Schachter, "International Rules," 132; and George Schwartzenberger, "The Fundamental Principles of International Law," *Recueil des Cours* 87, pt. 1 (1955), 333.

77. "Charter of the United Nations," art. 33.

78. Farer, 28. See also Bowett, 269; Kelsen, 80; Nydell, 478; and Schachter, "The Right of States," 1635–36.

79. As Schachter writes,

> These considerations indicate the legal dilemma faced in cases where an attack has already occurred and the victim state has a choice between using force and seeking redress through peaceful means. In my view, a categorical answer to the problem is not warranted. It would be unreasonable to lay down a principle that armed action in self-defense is never permissible as long as peaceful means are available. It would also be unreasonable to maintain that self-defense is always a right when an attack has occurred, irrespective of the availability of peaceful means or the time of attack. The difficulty in proposing a general rule does not mean that a reasonable answer cannot be given in particular cases. In a case involving imminent danger to the lives of captured persons, as in Entebbe or arguably in Tehran, it would be unreasonable to maintain that the continued pursuit of peaceful measures must preclude armed rescue action.

Schachter, "The Right of States," 1637.

80. See Bowett, 269; Brownlie, "Use of Force," 265; Farer, 28; Maizel, 71; and Sofaer, "Terrorism and the Law," 920.

81. See Farer, 28; Schwartzenberger, 334; and Shoham, 193.

82. Oscar Schachter, "Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis," *Journal of International Affairs* 37, no. 2 (Winter 1984): 242.

83. Ibid., 243.

84. See Bowett, 53; Carl Q. Christol and Comdr Charles R. Davis, USN, "Maritime Quarantine: The Naval Interdiction of Offensive Weapons and Associated Materiel to Cuba, 1962," *American Journal of International Law* 57, no. 3 (July 1963): 540; Farer, 28–30; Higgins, 303; and Kelsen, 83.

85. See Bowett, 269. Regarding how much force can be used, Brownlie notes,

> It remains to comment on the element of danger in the doctrine of proportionality. If a State is faced with a small-scale attack across its frontier at a time of tension, in circumstances

> which do not clearly indicate whether the attack is the result of a mistake or unauthorized act of a subordinate officer, or is the herald of an offensive, its reaction might be proportionate to the threat even if it were slightly more forceful that the actual attack, the extra force being a guarantee of decisiveness.

Brownlie, "Use of Force," 231. See also Christol and Davis, 540. Farer (p. 3) notes,

> Hence even if force must be proportional to the interest threatened, an escalation of force can be justified because an extremely important interest is jeopardized when the armed forces of the state are attacked. If the attacks intensify, the right of the intervening state to intensify his coercive behavior will increase proportionately, and so on ad infinitum.

Oscar Schachter argues that "the criterion of proportionality leaves a broad margin of discretion to a defending state but it also imposes well-understood limits." Schachter, "International Rules," 120.

86. Schachter, "The Right of States," 1638.

87. See Bender, 137; Maizel, 73; and Schachter, "International Rules," 132. Kelsen (p. 80) writes,

> It may prove reasonable only if it is proportionate to the end of protecting those interests (rights) that are endangered. The use of force in excess of this purpose is forbidden, since action taken in self-defense is held to have a strictly preventative character.

88. See Secretary of State Shultz's remarks in "US Exercises Right of Self-Defense," 3.

89. Secretary of Defense Caspar Weinberger quoted in "US Exercises Right of Self-Defense," 4.

90. See Brownlie, "Use of Force," 229; Bender, 134; Mallison, 360; and Nydell, 478.

91. See Bowett, 198.

92. See "The [International Military] Tribunal (Nuremberg), Judgment and Sentences," *American Journal of International Law* 41 (1947): 207. See also Bender, 132–33; and Brownlie, "Use of Force," 208.

93. Bowett (p. 105) writes, "Any state invoking the right of self-defence must be prepared to justify the measures it takes in pursuance of that right before an impartial international tribunal." Brierly (p. 407) argues, "But if it must necessarily be left to every state to decide in the first instance whether or in what measure an occasion calls for defensive action, it does not follow that the decision may not afterwards be reviewed by the law in the light of all the circumstances." Higgins (p. 304) observes that "temporarily, then a State must be judge in its own cause. However, in order that the right shall not be abused, it is essential that it be subjected to international review."

94. See Brierly, 416; Franck, 816–18; Kelsen, 63; and Nydell, 467–68.

95. George P. Shultz, "Terrorism in the Modern World," *Terrorism: An International Journal* 7, no. 4 (1985): 432.

96. Bowett, 196.

97. Ibid., 195. See also Farer, 35–36; Higgins, 207–98; and Nydell, 466–67.

98. Eugene V. Rostow's remarks in *Proceedings of the 77th Annual Meeting*, 34. See also Bishop, 777; and Bowett, v.

99. See Schachter, "International Rules," 119–20.

100. Brownlie, "Use of Force," 254.

CHAPTER 5

COLLECTIVE USE OF FORCE: ACTIONS STATES CAN TAKE TOGETHER

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against all of them; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defense recognized by Article 51 of the United Nations Charter, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> North Atlantic Treaty, article 5

> In the event of an armed attack in Europe on one or more of the States Parties to the Treaty by any State or group of States, each State Party to the Treaty shall, in the exercise of the right of individual or collective self-defence, in accordance with Article 51 of the United Nations Charter, afford the State or States so attacked immediate assistance, individually in agreement with other States Party to the Treaty, by all means it considers necessary, including the use of armed force.
>
> Warsaw Pact Treaty, article 4

If two or more states were to act in concert to use armed force in response to international terrorism or against state sponsors or supporters of terrorism, three potential but very different legal concepts exist to justify their course of action. They are collective self-defense under article 51 (chapter VII) of the United Nations Charter, regional enforcement action under article 53 (chapter VIII) of the Charter, and regional peacekeeping action under article 52 (chapter VIII).[1]

These three legal concepts embody two broad approaches. The first approach focuses on self-defense while the second, containing two different legal concepts under chapter VIII of the Charter,

focuses on regional organizations. The distinction between these two approaches can be confusing. For example, although they have a regional character, the North Atlantic Treaty Organization (NATO) and the Warsaw Pact are organized as collective self-defense arrangements under article 51. The Organization of American States (OAS), the Organization of African Unity (OAU), and the League of Arab States are regional organizations that are under the umbrella of chapter VIII of the UN Charter. However, during the 1962 Cuban missile crisis, the OAS, a regional organization, acted in a collective self-defense capacity.

D. W. Bowett, president of Queen's College, Cambridge University, and lecturer in the faculty of law at Cambridge and Manchester universities, believes that the confusion can be avoided if the focus is put properly on the function that the member states seek to perform and not on what sort of organization they appear to belong to. He writes,

> If . . . we start from the premiss that members of an organization, whether a regional arrangement or not, can always exercise this right of self-defence, then the relevant question becomes not "What sort of organization is this?" but rather "What function is it exercising?"[2]

Bowett adds that the reverse is also true, "that it is perfectly possible for an organization primarily designed for collective self-defence to be used for enforcement action if the members agree."[3]

In undertaking joint action, the states involved must understand the difference between collective self-defense on the one hand and the regional enforcement or peacekeeping action under chapter VIII on the other. The underlying legal conditions of each option are not the same. Thus, selecting an option will be affected by the factual circumstances prevailing at the time. This chapter reviews the options for joint action.

What Is Collective Self-Defense?

On 3 March 1945, the inter-American states signed the Act of Chapultepec. In describing the purpose of this agreement to the Senate Foreign Relations Committee, John Foster Dulles observed, "The Monroe Doctrine has to an extent been enlarged or is in

the process of enlargement as a result of the Mexico Conference and the declaration of Chapultepec, where the doctrine of self-defense was enlarged to include the doctrine of collective self-defense and where the view was taken that an attack upon any of the republics of this hemisphere was an attack upon them all."[4]

Two months after Chapultepec, at the San Francisco Conference, the issue arose as to how this concept of collective self-defense would be preserved under the United Nations Charter. Since article 103 of the Charter established the basic rule that obligations under the Charter would prevail over any inconsistent treaty,[5] the Charter had to include language regarding collective self-defense. That language is embodied in article 51, which provides for "individual or collective self-defense."[6] When first proposed, however, article 51 was drafted as part of chapter VIII of the Charter. If it had remained part of chapter VIII, collective self-defense would have been indistinguishable from regional enforcement action and would have been subject to the Charter's limitations on the latter type of action. But, as a result of a debate on this issue, article 51 was moved from the first article in chapter VIII to the last article in chapter VII. Collective self-defense and the Act of Chapultepec were given recognition by the Charter as akin to the concept of self-defense itself and not to be viewed as a kind of regional enforcement action. In the words of John Foster Dulles, who attended the San Francisco Conference as a US delegate, "At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that the doctrine of self-defense, enlarged at Chapultepec to be a doctrine of collective self-defense, could stand unimpaired and could function without the approval of the Security Council."[7]

The term *collective self-defense* is not defined in the UN Charter. Customary international law and the practice of states spell out the conditions necessary to exercise lawful collective self-defense. All the conditions for the exercise of legitimate individual self-defense, as described in chapter 4, are requirements for collective self-defense.

Some scholars argue that states must satisfy an additional condition if collective self-defense is to be legitimate. They imply that an individual and collective action differ in an essential way by asking: What is the unique condition that authorizes a third party to intervene in a dispute in support of another state that is the object of an actual or imminent armed attack?

Three schools of thought have emerged on this point. The first holds that a state has no legal right of collective self-defense separate from individual self-defense. The late Hans Kelsen, former professor of law at the University of California at Berkeley, is the chief proponent of this view. He asserts that self-defense "is a right of the attacked or threatened . . . state, and no other."[8] If several states are acting in collective self-defense, then for them to do so each must be acting in its own individual self-defense. States unable to claim in their own right to be acting in their individual self-defense—although they may have an alliance relationship with the victim state or a strong national interest in the matter—cannot act in support of another state; collective self-defense can never be more than the sum of states acting in their individual self-defense. Julius Stone, Australian jurisprudent on the law of force, summed up this position in these words: "Under general international law, a State has no right of self-defense in respect of an armed attack upon a third State."[9]

A second school of thought, whose chief spokesman is D. W. Bowett, holds that "the right of self-defence is available only to a state which defends its own substantive rights."[10] This school is less restrictive than the Kelsen school but it is not without strict limitations. Although Bowett does not believe that a state must be able to assert individual self-defense to participate in a collective self-defense action, he does believe that a close nexus must exist between the assisting and victimized state. He refers to this relationship as an interdependence of the securities of the states.

Bowett believes that a preexisting collective self-defense treaty arrangement is a prerequisite, but—and this is a critically important *but*—he finds that simply concluding a collective self-defense treaty will not suffice.[11] Rather, the interests of the attacked state must be "so intrinsically bound up with the territorial integrity and political independence of another State that the

defence by the latter State of the former is truly 'self'-defence.''[12]

Bowett has identified three relevant factors in making this determination: geographical, political, and strategic-economic proximity.[13] These factors are weighed to answer the only important question: ''Whether an attack upon one state in fact threatens the security of the other.''[14] If this test cannot be satisfied, then collective self-defense is illegitimate.[15]

The Bowett school believes that collective self-defense must be interpreted narrowly, otherwise the Charter system would be jeopardized. He writes,

> The danger of conceding to individual states or even groups of states the right to take collective security action, unauthorized by the competent organs of the United Nations, lies in the possibility that antagonistic groups may reach a decision that action is necessary ''to maintain or restore international peace and security'' and under a claim of right plunge the world into war.[16]

Additionally, this school views freedom to structure alliances, using collective self-defense as its legal foundation, as undermining the Charter's centralized collective security system vested in the Security Council.[17]

The Kelsen and Bowett schools of thought are advanced from time to time today. But a third school of thought has emerged. This school holds that the key ''legal issue is not whether the assisting state has a right of individual defense but only whether the state receiving aid is the victim of an external attack.''[18] Columbia University law professor Oscar Schachter reaffirms the rule in these words, ''The law clearly allows collective self-defense, so that a state may aid a victim of actual aggression.''[19] This third school of thought reflects the practice of states. Both NATO and the Warsaw Pact are based upon this third school's liberal approach to interpreting the UN Charter. Moreover, this third school has received the support of numerous recognized international legal scholars to include Moore, McDougal, Schachter, and Waldock.[20]

Additionally, this third school does not require a preexisting collective self-defense arrangement as a condition of assistance. Prof John Norton Moore, University of Virginia Law School,

writes, "Collective defense, whether pursuant to Article 51 or not, does not require a pre-existing regional defense agreement."[21] Sir Humphrey Waldock, former president of the International Court of Justice, agrees: "The word 'collective' does not appear to have been intended to cover only contractual systems of self-defense and any assistance to a member engaged in legitimate self-defense appears to be authorized by Article 51."[22] In sum, the only additional legal condition that must be satisfied to exercise legitimate collective self-defense, in contrast to individual self-defense, is that the assisting state must be aiding a victim state engaging in legitimate self-defense.

Regional Enforcement Action

Regional enforcement action refers to actions undertaken in accordance with article 53 of chapter VIII of the United Nations Charter. A regional organization is "any grouping of states in some defined geographical context with historic, ethnic or socio-political ties, which habitually acts in concert through permanent institutions to foster unity in a wide range of common concerns."[23] Should a regional organization seek to undertake an enforcement action within its region, it must comply with the conditions set forth in article 53.

Since only the Security Council has authority under the Charter to enforce international law, one requirement of article 53 is *prior* approval by the Security Council of any enforcement action before it is taken. Individual *and* collective self-defense actions taken under article 51 requires no prior Security Council approval. Therefore, a regional enforcement action, unlike self-defense action, is subject to the exercise of the right of veto. Failure to obtain a favorable Security Council decision denies legitimacy to any proposed enforcement action of the regional organization.[24] To undertake a regional enforcement action without Security Council prior approval is to act in violation of international law.

An additional requirement in article 54 of the Charter is that the Security Council shall at all times be kept fully informed of regional enforcement actions taken under article 53. This rule is in marked contrast to the provision in article 51 concerning in-

dividual and collective self-defense, which requires only after-the-fact reporting of measures taken.[25]

Regional Peacekeeping

Because of the requirement that prior Security Council approval be obtained, regional enforcement actions are highly unlikely. An alternative course of action is to pursue regional peacekeeping action under article 52 of the Charter. Regional peacekeeping differs from regional enforcement action in significant ways. First, regional peacekeeping is not directed at enforcing anything. It is directed at restoring law and order in situations where governmental authority has broken down or collapsed. After a review of the Security Council official record on the Dominican Republic crisis of May and June 1965, Moore concluded that "despite the Soviet argument to the contrary, there is substantial evidence that regional peacekeeping actions undertaken in a setting of breakdown of authority are lawful under the UN Charter. This has been the consistent position of the United States and the OAS."[26]

Second, since it is not an enforcement action under article 53 but a peacekeeping action under article 52, the states involved do not need to obtain prior approval of the action from the Security Council. The reporting requirement of article 54, however, applies to both articles 52 and 53; therefore, the Security Council must be kept fully informed at all times of the peacekeeping action undertaken.

Third, article 52, paragraph 2, provides that regional peacekeeping actions be taken as a last resort. Every effort to achieve peaceful settlement of the local situation must be attempted. Of course, fruitless efforts need not be pursued.

Fourth, regional peacekeeping must result from an invitation from the lawfully constituted government. The International Court of Justice held in *Certain Expenses of the United Nations* that "peacekeeping actions not directed against a state but undertaken with the permission of constitutional authorities were not an 'enforcement action'."[27] However, if such a government no longer exists because of the breakdown of law and order or through its

collapse, then such a request is not a precondition. Moore notes, regarding the 1983 Grenada operation, that

> the core of the OECS [Organization of Eastern Caribbean States] peacekeeping and humanitarian protective action was the breakdown of governmental authority and threats to the safety of civilians in Grenada. In such a setting, it is not required for lawful regional peacekeeping under the UN Charter, the OAS Charter or the OECS Treaty that there be a request from a nonexistent government.[28]

Fifth, and finally, article 52, paragraph 1, requires that regional peacekeeping action must be "consistent with the Purposes and Principles of the United Nations."[29] In the Grenada action, David R. Robinson, then Department of State legal adviser, stressed the point that "regional organizations have competence to take measures to maintain international peace and security, consistent with the purposes and principles of the UN and OAS Charters."[30] Moore also focused on this requirement when he wrote concerning Grenada, "A major qualification is that to be consistent with the purposes and principles of the United Nations, such actions must be designed to further internationally observe elections and self-determination of the people of the nation rather than the hegemony of a foreign state or imposition of a particular government."[31]

Summary and Transition

Nations seeking to resort to the use of armed force in concert could seek to support their actions by relying on any one of three basic legal concepts: collective self-defense under article 51 (chapter VII) of the UN Charter, regional enforcement action under article 53 (chapter VIII), and regional peacekeeping under article 52 (chapter VIII). Each has different conditions for its use. Whether any of these options will prove useful in countering terrorism will depend largely upon resolving an initial nonlegal question: Do states have the will to act in concert?

The next chapter examines several of legal arguments not considered thus far that could be advanced to justify the lawful use of force abroad. Chapter 6 completes the array of legal arguments

that could be advanced for the use of force in contemporary international relations.

NOTES

1. See John Norton Moore, "Grenada and the International Double Standard," *American Journal of International Law* 78, no. 1 (January 1984): 153.

2. D. W. Bowett, *Self-Defence in International Law* (New York: Frederick A. Praeger, 1958), 222.

3. Ibid., 223. See testimony of Warren Austin, ambassador to the United Nations, before the US Congress on the North Atlantic Treaty, in Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 12, ed. Marjorie M. Whiteman (Washington, D.C.: August 1971), 95, State Department, 8586. Austin stated, "It is not necessary to define the organization of the North Atlantic community as exclusively a regional arrangement, or as exclusively a group for collective self-defense, since activities under both Article 51 and Chapter VIII are comprehended in the treaty."

4. Testimony of John Foster Dulles, delegate to the San Francisco Conference, before Senate Foreign Relations Committee during hearings on the *Charter* of the United Nations, 79th Cong., 1st sess., July 1945, quoted in *Digest of International Law*, vol. 12:85.

5. "Charter of the United Nations," article 103, 26 June 1945, *Statutes at Large*, vol. 59:1031; United States Treaty Series (TS) 993; Department of State, *Treaties and Other International Agreements, 1776–1949*, compiled under the direction of Charles I. Bevans (hereinafter Bevans), vol. 3, *Multilateral, 1931–1945*, 1153; "Charter of the United Nations: Amendments to Articles 23, 27, and 67," 31 August 1965, Department of State, *Treaties and Other International Acts Series* (TIAS) 5857, *United States Treaties and Other International Agreements* (UST), vol. 16, pt. 2, 1134, United Nations Treaty Series (UNTS), *Treaties and Other International Agreements Reported and Filed or Recorded with the Secretariat of the United Nations*, vol. 557 (1966), no. 8132, 143; "Charter of the United Nations: Amendments to Article 109," 12 June 1969, TIAS 6529, UST, vol. 19, pt. 5, 5450; "Charter of the United Nations: Amendments to Article 61," 24 September 1973, TIAS 7739, UST, vol. 24, pt. 2, 2225. See also Moore, 158.

6. "Charter of the United Nations," art. 51.

7. Dulles testimony, *Digest of International Law*, vol. 12:85. See also Bowett, *Self-Defence*, 182–83; and International Law Association, American Branch, "Report of the Committee on the Use of Force in Relations among States," in *1985–86 Proceedings and Committee Reports* (New York: International Law Association, American Branch, 1986), 203.

8. Hans Kelsen, "Collective Security under International Law," *US Naval War College International Law Studies* (1956), 61.

9. Julius Stone, *Legal Controls of International Conflicts* (New York: Rhinehart and Co., 1954), 245.

10. D. W. Bowett, "Collective Self-Defence under the Charter of the United Nations," in *British Year Book of International Law, 1955–1956*, vol. 32 (Oxford, England: Oxford University Press for International Affairs, 1957), 150. See also Bowett, *Self-Defence*, 200; and Max Sorensen, *Manual of Public International Law* (New York: St. Martin's Press, 1968), 768–69.

11. See Bowett, *Self-Defence*, 217 and 235.

12. See Rosalyn Higgins, "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice," in *British Year Book of International Law, 1961*, vol. 37 (Oxford, England: Oxford University Press for Royal Institute for International Affairs, 1962), 307.

13. See Bowett, "Collective Self-Defence," 130.

14. Bowett, *Self-Defence*, 238.

15. For a discussion, see Higgins, 307.

16. Bowett, *Self-Defence*, 244.

17. Ibid., 218.

18. "Report on Use of Force," 208.

19. Oscar Schachter, "In Defense of International Rules on the Use of Force," *University of Chicago Law Review* 53, no. 1 (Winter 1986): 120.

20. See John Norton Moore, "The Lawfulness of Military Assistance to the Republic of Vietnam," in *The Vietnam War and International Law*, ed. Richard A. Falk, vol. 1 (Princeton, N.J.: Princeton University Press, 1968), 237–70; Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale University Press, 1961), 248; Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April-May 1984): 1638–39; and Sir Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours* 81, pt. 2 (1952), 504.

21. Moore, "Lawfulness of Military Assistance," 237.

22. Waldock, 504.

23. Thomas M. Franck, "Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States," *American Journal of International Law* 64, no. 4 (October 1970): 832.

24. See "Charter of the United Nations," art. 53. See also for discussion, Bowett, *Self-Defence*, 241–42; Lloyd N. Cutler, "The Right to Intervene," *Foreign Affairs* 64, no. 1 (Fall 1985): 96; Higgins, 270–71 and 297–98; Schachter, "The Right of States," 1641; and Gerhard von Glahn, *Law Among Nations*, 3d ed. (New York: Macmillan Publishing Co., 1976), 167.

25. See "Charter of the United Nations," art. 54. See also Bowett, *Self-Defence*, 219–20.

26. Moore, "Grenada," 156. Moore also quotes Leland M. Goodrich, E. Hambro, and A. P. Simons from their book *Charter of the United Nations* written in 1969 as follows:

> In the [Security] Council discussion [concerning the Dominican crisis of 1965], one representative pointed out that the expression "enforcement action" presupposed the existence of something to be enforced, and that consequently enforcement of a recommendation, as contained in the OAS resolution, was a contradiction in terms. He also stressed that the OAS was carrying out a conciliatory mission, its forces were not there in support of any claim against the state, and its function was that of pacific settlement under Article 52 and not that of enforcement under Article 53. This appears to have been the view of the majority of Council members.

Moore, "Grenada," 155.

27. *Certain Expenses of the United Nations*, advisory opinion, 1962 ICJ 155.

28. Moore, "Grenada," 159. The problems created for a nation that has no regional organization through which it can work are evident in the comparison between the US action to quarantine Cuba and the Israeli attack on the Iraqi nuclear reactor. Matt S. Nydell addresses this comparison, writing,

> U.S. officials repeatedly and consciously rejected the article 51 self-defense argument as a legal basis for the action. The administration was concerned that reliance on the doctrine of self-defense would set a bad precedent and weaken the requirement that self-defense not be invoked except in case of "armed attack." Instead, the U.S. action was explained in terms of the collective security provisions of the OAS [Organization of American States] Charter. Israel, however, had no collective security device to invoke, and had only self-defense under article 51 as a justification.

Nydell, "Tensions between International Law and Strategic Security: Implications of Israel's Preemptive Raid on Iraq's Nuclear Reactor," *Virginia Journal of International Law* 24, no. 2 (1984): 485.

29. "Charter of the United Nations," art. 52, para. 1. See Moore, "Grenada," 154.

30. See letter of David R. Robinson, 10 February 1984, in "Resort to War and Armed Force: Organization of Eastern Caribbean States: Grenada 1983" (US *Digest*, chap. 14, sec. 1), Contemporary Practice of the United States Relating to International Law, *American Journal of International Law* 78, no. 3 (July 1984): 662.

31. Moore, "Grenada," 155.

CHAPTER 6

OTHER LEGAL ARGUMENTS TO JUSTIFY USE OF FORCE

States have a duty to refrain from acts of [peacetime] reprisal involving the use of force.

United Nations General Assembly
Resolution 2625, 25th Session

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government.

Slaughterhouse cases

Citizenship is membership of a political society and implies a duty of allegiance on the part of the members and a duty of protection on the part of society.

Luria v. United States

Lauterpacht, the great protagonist for the recognition of human rights, felt bound to concede that the doctrine of humanitarian intervention "never became a fully recognized part of positive international law."

James L. Brierly

The preceding two chapters analyzed various legal arguments to support the legitimate use of armed force in the contemporary international environment. Chapter 4 looked at the concept of individual self-defense while chapter 5 reviewed the ways in which states may act in concert. This chapter considers the remaining legal arguments that could be made to justify resort to armed force: invitation, peacetime reprisal, protection of one's own nationals, humanitarian intervention, hot pursuit, piracy, and self-help. Some

of these have a high acceptance level by the world community as measured by the customary practice of states and by the writings of respected international law scholars; others do not. Understanding these arguments in conjunction with those previously discussed will provide a panorama of international law regarding the use of force today.

Invitation

When consent is given by a host state to another state's foreign military presence and activity within its territory, then as a matter of law no intervention or interposition occurs. The foreign armed forces are said to be invited. Invitation is a right of every sovereign and consent given in advance exonerates the foreign state from international responsibility as an intervenor. Use of armed force abroad may be legitimated by invitation.

The difficulty with the concept of invitation, a legal concept that has an extremely high acceptance level, is in its application to factual circumstances. Three basic conditions must exist for there to be a valid invitation: it must be made by the lawful government, the official extending the invitation must have the constitutional authority to do so, and it must be freely made without coercion or intimidation.[1]

Invitation may be a very useful approach to dealing with international terrorism especially since some countries may lack the technological and military means of responding to modern terrorists and their state sponsors and supporters. A good example of this situation was Somalia's inviting the Federal Republic of Germany to rescue the hostages of the Lufthansa flight hijacked to Mogadishu in 1977.[2]

Unlike the Mogadishu incident, many situations in which invitation is claimed are unclear because the facts underlying the invitation are questionable or uncertain. The following examples demonstrate this point. The 1961 intervention by the United Kingdom at the request of Kuwait has been criticized because "no *bona fide* invitation could be made or received, as Kuwait was a part of Iraq, and not a sovereign State at all."[3] The Hungarian government was considered "incapable of making a free invita-

tion'' to the Soviet Union in 1956.[4] The alleged 1968 Czechoslovakian invitation to the Soviets evaporated in denials by the Prague government and the USSR had to find other grounds to justify its action. Columbia University law professor Oscar Schachter writes,

> When the Soviet Union sent troops into Czechoslovakia in 1968, for example, it asserted that this action came in response to that government's ''urgent'' request for assistance. After this justification had been repudiated repeatedly by the Czechoslovak National Assembly, and was specifically disavowed in a message from the Czechoslovak Foreign Ministry to the [UN] Security Council, the Soviet Union relied instead on a more general claim of self-defense under the U.N. Charter. Not surprisingly, most outsiders viewed many of these legal contentions skeptically.[5]

Free consent is integral to invitation. It does not exist in circumstances such as those described by Henry Fielding in *Jonathan Wild* that he ''would have ravished her, if she had not, by timely compliance, prevented him.''

The United States claimed invitation as one of the grounds justifying its 1983 action in Grenada. Much has been written about this case because so many of the facts bearing on the conditions necessary for invitation are disputed. For example, did Governor-General Paul Scoons possess the constitutional authority to make the request? Scoons was not the prime minister but the governor-general, an appointee of the queen of England. Was the request made before or after the decision to intervene? Even if it were not, is it sufficient that the request was made prior to the actual intervention? What was the nature of Scoon's request? *The Economist* quotes Scoons as saying, ''What I did ask for was not an invasion but help from the outside.''[6]

The United States relied upon two other arguments in support of the Grenada operation: collective self-defense and protection of one's own nationals—more than 1,000 threatened Americans were on the island, including 800 US students studying medicine there. However, most foreign governments, including many Western allies, questioned the US action. The UN General Assembly, by a vote of 108 to 9, adopted a resolution on 2 November 1983 condemning the intervention as a violation of in-

ternational law.[7] Although invitation as a legal concept is accepted by the international community, the international community carefully scrutinizes any claim of invitation and resolves any doubtful facts against the state using force.

Peacetime Reprisal

Peacetime reprisal is "such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency."[8] This definition embodies three important elements of peacetime reprisal. First, state A has committed a wrong against state B, and state B is taking the reprisal against state A. Second, the use of armed force by state B would itself be illegal under international law if it were not for the original wrong of state A. Third, the purpose of the reprisal is to obtain a satisfactory settlement of the differences between the two states.

Peacetime reprisals have their roots in medieval times. From the fourteenth to the eighteenth century the system of reprisal operated as a private right. When individuals suffered injury abroad from a foreign state and were unable to obtain redress, they would then seek authority from their sovereign to take reprisal against the foreign sovereign. This concept was recognized in the United States Constitution, which provides in article 1, section 8, that the Congress shall have the power to "grant Letters of Marque and Reprisal." By the early 1800s special or private reprisals were increasingly subject to restricted use. By the nineteenth century only states were permitted to take reprisals. In the Treaty of Paris of 1856 states agreed to abolishing the right of private reprisal. In the words of Gerhard von Glahn, professor of political science at the University of Minnesota at Duluth, "Since [1856], reprisals by private individuals have been illegal and only states may have recourse to this method. . . . Such action must then be taken either on behalf of the state itself, if it believes itself to have been injured illegally, or by the state on behalf of its injured citizens."[9]

Although accepted in classical customary international law, reprisals have been subject to criticism on the following grounds. First, forcible reprisal is a remedy available only to the strong over the weak. Second, it allows the injured state to both judge the wrong done against it and to extract the reparation for that wrong. Third, reprisals connote an eye for an eye, revenge, and retaliation. Fourth, reprisals tend to embitter relations among states. Fifth, reprisals can result in counterreprisals and escalation of the use of force between states.[10]

Despite this narrowing of its legitimacy, armed peacetime reprisal not only remained acceptable conduct in international law but also in practice. Between 1811 and 1911 the Department of State records that the United States engaged in peacetime reprisal in no less than 48 instances. Such interventions were becoming commonplace and the reasons for them less important. In 1914 the United States landed forces in Mexico because Gen Victoriano Huerta refused to apologize to an American sailor.[11]

During the nineteenth and early twentieth centuries, frequent peacetime reprisals associated with colonialism pointed to the need for clarifying the conditions necessary for resort to forcible reprisal in peacetime. The landmark case for restatement of the customary rules of reprisal arose out of the 1928 Portuguese-German arbitration of the 1914 Naulila incident in Portuguese Angola. In October 1914, at a time when Portugal was a neutral in World War I, a German official and two German military members were killed and two others interned at a Portuguese frontier outpost. The governor-general of South-West Africa ordered a reprisal and sent German forces into Angola. The German forces destroyed a Portuguese fort at Cuangar and four minor posts. The Portuguese felt compelled to withdraw. A minor native uprising and pillaging followed. Both countries, thereafter, agreed to submit the matter to arbitration.[12]

The tribunal that arbitrated the Naulila incident issued the "most authoritative statement of the customary law of reprisals."[13] The tribunal laid down three conditions for reprisal: a previous illegal act; a demand for redress—"the necessity of resorting to force cannot be established if the possibility of obtaining redress by other means is not even explored"; and, the act of reprisal must have

been proportional, that is, "the measure adopted must not be excessive, in the sense of being out of all proportion to the provocation received."[14] The German reprisal did not meet these conditions and the arbitral award was in favor of Portugal. Although the Naulila arbitration established the basic conditions for peacetime reprisals, customary international law and the writings of recognized scholars delineate other conditions that are inherent to any legitimate act of reprisal.

The action must be taken in peacetime. The action must be taken without belligerent intent in a peacetime context. There is no declaration of war and no intent to recognize a state of armed conflict. In the words of the late Sir Hersch Lauterpacht, British international law scholar and judge of the International Court of Justice, the purpose of peacetime reprisal is "for such international delinquencies as they thought not important enough for a declaration of war, but too important to be entirely overlooked."[15] Peacetime reprisal must be distinguished from reprisals in time of war or armed conflict—the latter are governed by a different set of circumstances and a separate body of international law with distinct rules.

The action must be taken in response to prior illegal conduct of another state or recognized international entity. This condition was considered basic in the Naulila incident arbitration. Without a prior illegal act, the reprisal cannot be justified. It is the prior illegal act that makes the reprisal, which is an otherwise unlawful act, legal.[16]

The action must be taken for a punitive purpose. This condition distinguishes reprisal from self-defense. The purpose of self-defense is protection; the purpose of reprisal is punishment. Reprisals are not taken in response to actual or imminent armed attack. They are taken to extract reparations or to compel the delinquent state to comply with international norms in future conduct. Although this difference seems clear enough, in practice it may not be so. Whether a state acts to protect itself or punish the delinquent state is not always so evident. D. W. Bowett, president of Queen's College, Cambridge University, and lecturer in law at Cambridge and Manchester universities, describes the problem thusly:

> To take what is now perhaps the classic case, let us suppose that guerrilla activity from State A, directed against State B, eventually leads to a military action within State A's territory by which State B hopes to destroy the guerrilla bases from which the previous attacks have come and to discourage further attacks. Clearly, this military action cannot strictly be regarded as self-defense in the context of the previous guerrilla activities; they are past, whatever damage has occurred as a result cannot now be prevented and no new military action by State B can really be regarded as a defense against attacks in the past. But if one broadens the context and looks at the whole situation between these two states, cannot it be said that the destruction of the guerrilla bases represents a proper, proportionate means of defense—for the security of the state *is* involved—against future and (given the whole context of past activities) certain attacks?[17]

The initial determinative factor is the way in which the acting state seeks to characterize its own action. Does the state view its use of force as self-defense in accordance with the customary rules of international law governing self-defense and in compliance with article 51 of the Charter or does the state see its use of force as an act of reprisal?

The action must be preceded by a demand to redress the wrong. The delinquent state must be advised of the wrong, demand must be made for reparations or changed conduct, and the delinquent state must be given reasonable time to comply. Elements of this requirement are publication of the demand and a conclusion, through action or inaction, that the demand has been refused.[18]

The action must be taken as a last resort. This condition may be viewed as another way of looking at the previous condition but it stresses the importance of peaceful settlement. Reprisals "are not to be started unless and until efforts at a peaceful settlement of the dispute have failed."[19] Reprisals are admissible only after negotiations have taken place.

The action must be halted as soon as its objective is attained. The purpose of reprisal is to obtain redress through satisfaction of demands. When those demands are satisfied, be they reparations or altered conduct, the reprisal must cease.[20]

The action must be proportional to the original injury suffered. On the one hand, armed reprisal is not available for redress of trivial rights. On the other hand, when armed reprisal is available

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it must be measured and not excessive in the sense of being out of proportion to the original wrong nor disproportionate in achieving its redress. Relevant factors are size of force used, targets selected, and weapons and tactics employed.[21]

The action must show due regard for third states. A reprisal must be employed in such a manner as not to injure third states intentionally. If a reprisal damages property of a third state or injures or kills third state nationals, the state taking the reprisal may be liable for the resulting damages.[22]

The action must not be taken against protected persons. Certain acts of reprisal are never justified, as for example, reprisals against diplomatic personnel whose person and property are universally protected. Some writers see this restriction extending to any act that would violate human rights or certain standards of safety and life, such as those in the air or at sea.[23]

The action cannot be in response to a prior lawful reprisal. Needless to say, a state that is the object of a lawful reprisal cannot itself take a reprisal since one of the conditions of a reprisal is a prior unlawful act. Of course, the conundrum is whether a reprisal is lawful.[24]

Status of Reprisal in Contemporary International Law

What is the legal status of reprisal today? It has a very low level of acceptability. The general view is that articles 2(3) and 2(4) of the UN Charter have outlawed peacetime reprisals. UN General Assembly resolutions have called on states to refrain from its use.[25]

When states have relied upon it, the UN Security Council has condemned their action soundly.[26] Bowett, Brierly, Brownlie, Falk, Harlow, Higgins, McDougal, Wright, and most other recognized scholars agree that peacetime reprisals are forbidden by contemporary international law.[27] The United States has supported this view. On 29 May 1974 Kenneth Rush, acting secretary of state, in responding to a suggestion from Prof Eugene Rostow, Yale University Law School, that the United States endorse the right of peacetime reprisal, argued as follows:

> You would add a complementary principle, namely, that where a state cannot or will not fulfill its international legal obligations to prevent the use of its territory for the unlawful exercise of force, the wronged state is entitled to use force, by way of reprisal, to redress, by self-help, the violation of international law which it has suffered.
>
> As you know, [UN General Assembly] Resolution 2625 also contains the following categorical statement, "States have a duty to refrain from acts of reprisal involving the use of force." That injunction codifies resolutions of the Security Council which have so affirmed.
>
> The United States has supported and supports the foregoing principle. . . . Yet, essentially for reasons of the abuse to which the doctrine of reprisals particularly lends itself, we think it desirable to endeavor to maintain the distinction between acts of lawful self-defense and unlawful reprisal.[28]

Again on 16 February 1979, Julia W. Willis, deputy assistant legal adviser for European affairs in the Department of State, concluded, after an exhaustive study of the issue of reprisal, that "the United States has taken the categorical position that reprisals involving the use of force are illegal under international law."[29]

A few states, such as Israel, have claimed the right to reprisal.[30] Writers like Prof Richard A. Falk of Princeton University have noted that taking this position has placed Israel in an adversarial relationship with the international community.[31] To mitigate these negative effects Falk suggests that Israel conduct its reprisals within a framework of 12 principles.[32] Falk is not arguing that Israel's reprisals will, thereby, become lawful; only that they will be less offensive.

Some, like Bowett, are becoming increasingly concerned about recurring acts of reprisal since the UN Charter entered into force. He identified 22 incidents of reprisal from 1953 to 1970 that were discussed and acted upon by the Security Council.[33] Bowett fears that "if this trend continues, we shall achieve a position in which, while reprisals remain illegal *de jure*, they become accepted *de facto*."[34]

Finally, although peacetime reprisals are unlawful, reprisals in time of armed conflict are not. Reprisals in time of armed conflict are severely regulated by the law of armed conflict including, in particular, the 1949 Geneva conventions. Such reprisals may

not be taken, for example, against protected persons including prisoners of war, medical and chaplain personnel, civilians in occupied territory, or sick, wounded, or shipwrecked persons.[35] But, if a state of armed conflict exists, then reprisals become a legal possibility.

Protecting One's Own Nationals

Customary international law has long "recognized the right of a State to employ its armed forces for the protection of its nationals abroad in situations where the State of their residence is either unable or unwilling to grant them protection."[36] Judge Max Huber in the Spanish Moroccan claims (1925) noted that in such circumstances territorial sovereignty must yield. He wrote, "However, it cannot be denied that at a certain point the interest of a State in exercising protection over its nationals and their property takes precedence over territorial sovereignty."[37] The United States has used its armed forces frequently for this purpose: in 1814 and 1815 in Spanish West Florida; in 1836, 1874, 1877, 1878, 1880, 1882, 1890, and 1914 in Mexico; in 1895 in Korea; in 1899 and 1900 in China; and in 1899 in Nicaragua.

As an incidence of citizenship, the Supreme Court recognized the duty of the government to protect United States nationals abroad.[38] The theory emerged that injury to a national was equivalent to an injury to the state. "There is no great difference between . . . 'protection of nationals'," writes Oxford University lecturer in law Ian Brownlie, and "'direct injury' to the state. It is absurd to suggest that the interest a state has in the treatment of its nationals is of a second order."[39]

The debate over whether "protection of one's own nationals" survived under the Charter of the United Nations is part of the debate between the restrictionist and expansivist schools discussed in chapter 4. The prevailing view, which corresponds to that of the expansivist school, considers "protection of one's own nationals" as part of the customary right of self-defense under article 51 and sees "self" in self-defense as including the nationals of a state.[40]

The premise that self-defense includes the right to protect one's nationals is supported by the United States, West Germany, Great Britain, Belgium, Egypt, Israel, and other states. It is not supported by most Latin American states, which have experienced the abuses of this form of self-defense, as a pretext for intervention.[41] In recent years protection of one's own nationals has served as one of the central arguments justifying hostage rescue efforts: the Israelis in the 1976 Entebbe operation; the West Germans in 1977 in Mogadishu; the Egyptians in 1978 at Larnaca, Cyprus; and the United States in the Iranian hostage rescue attempt of 1980 and the Grenada operation of 1983. The opinion of the International Court of Justice in the Iranian hostage case supports the position that a state acting to protect its own nationals is not acting in violation of international law, including the Charter.[42]

The United States also relied upon this rationale as one argument in support of the Libyan raid of April 1986. In the words of Ambassador Vernon Walters, US permanent representative to the United Nations, "if the inherent right of self-defense, specifically recognized in Article 51 of the Charter, does not include the right to protect one's nationals and one's ships, what does it protect? The idea that a state should be condemned for seeking to protect the lives of its nationals who are subject to armed attack is too absurd for further comment."[43]

International terrorism challenges the duty of states to protect their nationals. In the words of New Zealander Gayle Rivers, a special forces trained counterterrorist, "to put it succinctly, the job of the government is to protect you anywhere in the world. The job of the terrorist is to make you feel unprotected everywhere in the world."[44] Accepting this challenge, section 1453 of the 1986 Department of Defense Authorization Act provides that it is the duty of the government to safeguard the safety and security of US citizens against a rapidly increasing terrorist threat.[45] Although it may be the duty of the government to protect its citizens abroad at all times, clearly governments are not authorized to use armed force to achieve that protection in every case. Certain conditions must prevail before resort to a forcible response becomes legitimate.

The action must be taken in behalf of one's own nationals. The nationality nexus is essential. It is the relationship between a state and its nationals that permits the use or threatened use of force as part of the concept of self-defense.[46] Corporations may qualify if the nationality relationship can be established. If, however, action is contemplated in behalf of another state's nationals, then it must be justified, if at all, under the principle of humanitarian intervention as discussed below.

The action must be necessitated by the unwillingness or inability of the territorial state to afford the protections demanded by international law. This requirement links the duty of protection of one's nationals to the duty of state responsibility as discussed in chapter 3. This condition has two basic elements. First, the territorial state does not have an absolute obligation to protect foreigners in all circumstances. Crimes such as murders, assaults, robberies, and kidnappings are indigenous to all societies and affect citizens and foreigners alike. Second, the territorial state must fail in an obligation that it does have under international law. A state fails when injury or death results to a foreign national "either from the acts of the territorial state and its authorities or from the acts of individuals or groups of individuals which the territorial state is unable, or unwilling, to prevent."[47] Examples are "a breakdown of law and order in the territory concerned, or from mob violence which the local authorities are unable to control."[48]

The action must be taken as a last resort. Writers describe this condition in different words but see the use of armed force as the final choice. Bowett speaks of failed or inadequate diplomatic efforts.[49] Thomas R. Krift talks of the "unavailability of any other less extreme solution."[50] Col Dennis Corrigan, US army judge and international law practitioner, writes that intervention is "only justified when resort to all peaceful means of resolving the situation have been tried and failed."[51] As with so many other legal justifications for the use of force, all peaceful means must be exhausted or found unavailable or fruitless.

This third condition became a central issue in the Iranian hostage case because the United States attempted a rescue mission while the matter of the hostages was pending before the International Court of Justice. Had the United States exhausted its peaceful

remedies? The Court did not find the United States action unlawful on this ground. Instead, the Court made a distinction between unlawful action and action incompatible with respect for the judicial process. The Court was of the opinion that so long as the case was pending, US action should be limited.

Prof Ted Stein, University of Washington School of Law and formerly with the legal adviser's office of the US Department of State, wrote, "A scrupulous regard for the Court and its processes would have led the United States either to terminate proceedings once Iran's attitude became unmistakably clear or to forego a military solution."[52] Columbia University's Oscar Schachter provided another view: "It is not unreasonable to conclude that the United States could not be assured of the safety of the hostages simply because judicial proceedings were pending. As a matter of principle, exhaustion of remedies cannot be required when the 'remedies' are likely to be futile. The state whose nationals are in peril must be given latitude to determine whether a rescue action is necessary."[53]

The action must be taken in response to immediate danger to life or property. D. W. Bowett states the rule in these words, "Not all cases of state responsibility will involve another state's right of protection by means of armed intervention, for many and indeed most forms of breach do not carry any immediate threat of irreparable injury to the life or property of aliens."[54] Physical injury or death are irreparable by definition. "No subsequent action, remedy, redress, or compensation," writes Sir Gerald Gray Fitzmaurice, judge of the International Court of Justice, "can bring the dead to life or restore . . . limbs to the maimed. There is no remedy except prevention. In this lies the ultimate justification for intervention of this kind."[55] The difficulty is in judging the immediacy of the threat in terms of whether lives are in imminent danger.[56]

Although armed force can be used to protect property under this approach, in reality, such use can be justified only in exceptional circumstances. An action to protect property rarely can satisfy all the required conditions. In particular, if the property concerned does not have a unique, special, or intrinsic value, then

it would not be possible to establish the relationship between its actual or threatened damage or destruction and the national security interests of the state.[57]

The action must be taken to protect the essential rights (national security interests) of the state. Although it is the person or property of the national that is directly endangered, there also must be an indirect threat or danger presented to the essential interests of the state of that national. Clearly not all deaths, injuries, or mistreatments of nationals in a foreign country will justify intervention, nor will damage or destruction of property belonging to one's nationals in most cases. Those acts must occur in a manner or in a pattern that adversely affects the security of the state: for example, nationals of state X cannot safely travel or live in state Y. As Bowett writes, "The right of protection extends to those cases where the interests of nationals are endangered, whether they be interests in personal safety or in property, are essential in the sense that their destruction involves an irremedial and serious injury directly to the nationals involved, and indirectly to the state affording them protection."[58]

The action must be proportionate. The principle of proportionality permits only that amount of force necessary for the protection of threatened or endangered lives and property. Lord McNair, former president of the International Court of Justice, said in a speech to the House of Lords on 12 September 1956, "It is true that a Government is entitled to use a necessary amount of armed force, and no more, for the protection of its nationals in a foreign country and their property."[59] The purpose is to secure one's nationals. Force that is excessive, unreasonable, or unnecessary does not serve this purpose but rather is outside of it. When proportionality is not observed, there is a strong indication that force is being misapplied beyond its purpose for other improper goals.

The principle of proportionality imposes a threshold. It requires a balance between the minimum force required and the interest threatened. At times such a balance cannot be achieved. When this occurs, intervention must be rejected as an option. For example, protection of many property interests cannot justify even the very minimum application of force.[60] The nature and kind

of property and its implication for national security are among the factors that can tip the scales.

The action must be confined strictly to protection of one's nationals. If other purposes or objectives are sought, then the action becomes illegitimate. Experience shows that what happens more frequently than not is a change in purpose. Originally the operation is directed at protecting one's nationals; but once armed force is interposed into a foreign country, other objectives arise. These may include establishing law and order within the foreign state, changing the foreign government, punishing those responsible for ill treatment of one's nationals, or open occupation.

Writers and scholars generally agree that the rescue operations in Stanleyville in 1964, the Dominican Republic in 1965, and Grenada in 1983 were initially all legitimate forms of intervention in behalf of one's nationals. Scholars do not agree, however, as to whether they remained so once the operations were under way. How long the forces stayed, their size and composition, and the actions they took while present in the territory of the foreign state raised the question "whether the interventions, though originally justified by necessity, became tainted with illegality through subsequent interference in the affairs of the territorial state."[61]

The action must be a protective and not a punitive action. This condition flows, in part, from the preceding condition. The objective is to safeguard one's nationals and not to punish those in authority or the citizenry of the territorial state. In part this condition is a recognition that protecting one's nationals is a form of self-defense. It is not a punitive form of reprisal.

Another significance of this condition is: If the damage or injury has already occurred, then this approach is no longer available as an option. It will, of course, be open to judgment as to whether other nationals are in jeopardy and, therefore, the threat continues to exist. The issue is whether it can be said that there is an act yet to be prevented. As Prof Tom J. Farer, Rutgers University Law School at Camden, has concluded, "If the damage has been consummated, time is no longer of the essence and there must be recourse to modes of redress other than unilateral coercion."[62]

Humanitarian Intervention

A pre-Charter definition described humanitarian intervention as "reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment that is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with justice and reason."[63] The post-Charter definition remains much the same except for an emphasis on human rights. Humanitarian intervention is undertaken "in order to remedy mass and flagrant violations of the basic human rights of foreign nationals by their [own] governments."[64]

Jurists such as Grotius, Vattel, Wheaton, Heilberg, Woolsey, Bluntschli, Westlake, Stowell, Lawrence, and Borchard claim that customary international law recognizes the doctrine of legal intervention in situations where a state denies its people fundamental human rights in a way that shocks the conscience of mankind.[65] But pre-1945 state practice does not offer strong support for this view. Examples of humanitarian intervention during this period include several interventions in the affairs of the Ottoman Empire by the Concert of Europe in behalf of Christians; the 1827 efforts of Great Britain, France, and Russia to end Turkish massacres in Greece resulting in Greek independence in 1830; the 1866–68 demands by Austria, France, Italy, Prussia, and Russia for better treatment of Christians in Crete; the 1877–78 Russian intervention in Turkey to end persecutions in Bosnia, Herzegovina, and Bulgaria; and the 1903–08 interventions by Austria, Russia, Great Britain, Italy, and France in Turkey for misrule in Macedonia. Other historical examples include the 1830 blockade of Antwerp by European powers in support of the Belgics against the kingdom of the Netherlands; French intervention in Syria in 1840 and 1861; and US intervention in Cuba in 1898, where, according to President William McKinley, the action was taken "in the cause of humanity and to put an end to barbarities, bloodshed, starvation, and horrible miseries." In other instances the United States has sent strong notes alluding to the doctrine of humanitarian intervention without initiating an intervention—for example, the 1903 US note to the signatory powers of the Treaty

of Berlin threatening US intervention in Rumania in behalf of Jews there and the US note of 1903 addressed to the Russian Foreign Office regarding the massacre of Jews at Kishinev. However, the assertions of Japan in support of its invasion of Manchuria and the 1938 claim of Adolf Hitler concerning ethnic minorities in Czechoslovakia were clear abuses of this doctrine.[66]

After a careful study of these pre-1945 instances of humanitarian intervention, law professors Thomas M. Franck and Nigel S. Rodley, both of New York University, conclude,

> In sum, these cases do not sustain the contention of the authorities who assert a long, credible, and creditable history of humanitarian intervention by force of arms. . . . On the other hand, the records of that period are replete with State Department and Foreign Office communications designed to prevent unilateral humanitarian intervention by other States.[67]

In contrast, Sir Hartley (later Lord) Shawcross, British solicitor-general at the Nuremberg trials, viewing the issue from the perspective of those trials, argues that "the right of humanitarian intervention on behalf of the rights of man trampled upon by the state in a manner shocking the sense of mankind has long been considered to form part of the recognized law of nations."[68]

However, if the issue of whether such a right were recognized in international law was in doubt, then the UN Charter should have put it to rest. The overwhelmingly accepted view is that the doctrine did not survive the Charter.[69] Those few who assert that it has survived reason that human rights is a fundamental purpose of the United Nations and, therefore, force is permitted to achieve human rights. This argument presents several problems. First, the Charter contains other fundamental purposes of an economic, social, and cultural nature. Can force be used to achieve these ends as well? Second, articles 2(4), 2(7), 51, and chapter VIII recognize only certain accepted uses of force (self-defense, regional enforcement action, regional peacekeeping, and UN Security Council authorized actions) and does not recognize humanitarian intervention. Unless undertaken at the invitation of a recognized government or in accordance with a recognized mode for employing force under the Charter, humanitarian intervention cannot be justified. Humanitarian intervention is not an in-

dependent legal doctrine that can legitimate the use of armed force.[70]

The post-Charter history of humanitarian intervention supports this view. Soviet interventions in Hungary in 1956 and in Czechoslovakia in 1968 relied upon it but such claims were rejected by the international community. In 1965 the United States originally relied upon this doctrine to support actions in the Dominican Republic; but two days later President Lyndon Johnson recharacterized it as a self-defense action and another two days after that called the action a stopgap measure until the Organization of American States (OAS) could act.[71] The doctrine was used to support the 1964 Congo action but was widely criticized by African states, and Indonesia relied upon it for its actions in East Timor in 1975 where "humanitarian intervention was a thin smoke screen for aggression and annexation."[72]

Perhaps the best case for humanitarian intervention could have been made for India's 1971 action in Bangladesh. Prof Richard B. Lillich, University of Virginia Law School, who is one of the few supporters of the doctrine of humanitarian intervention, writes,

> The actual course events took during 1971 in Bangladesh (formerly East Pakistan) should put an end once and for all to the doctrinal argument that "action in part concerned with the protection of human rights and the prevention of genocide may be lawful" when, and only when, undertaken by international institutions.[73]

The only difficulty with this position is that although India's original statement in the United Nations Security Council justified the use of force on this ground, when the final official record was published (after editing by India), the justification cited was Pakistan's alleged initial attack by armed force against India.[74] India did not rely on humanitarian intervention as a basis for its action.

Not only has the practice of states not supported the doctrine of humanitarian intervention, but some jurists and scholars have argued that, when used, this doctrine has been a cover for baser political purposes and has been directed primarily by the strong Western states against the weaker third world. Likewise, the "negative" practice of states has failed to lend credence to the

validity of the doctrine. Franck and Rodley observed that "a 'right' so little exercised in circumstances where morality, if not law, most craves its application is rightly suspect."[75] Some of the circumstances where intervention might have been appropriate but did not occur are the Russian pogroms of the 1800s; Nazi Germany's treatment of the Jews and others; the massacres in Armenia from 1890 to 1913 by the Turks; Soviet suppression in Hungary in 1956; and the genocides in Indonesia, Southern Sudan, Rwanda, Burundi, and South Africa. Likewise states might have intervened in Bangladesh for humanitarian reasons but did not. The French argued that they were invited into the Central African Empire at the invitation of the new government after Emperor Bokassa was overthrown; Spain denied involvement in the coup that ousted President Macias Nguema of Equatorial Guinea; Tanzania argued that its troops had entered Uganda to punish Idi Amin for incursions into Tanzania and it was coincidental that this action occurred at the time of his overthrow; and Vietnam argued that Pol Pot was deposed in 1979 by the Cambodian people and not by its intervention.[76]

Finally, UN General Assembly resolutions do not support this doctrine and neither do most jurists.[77] Among the contemporary international lawyers who, from their writings, do not are Akehurst, Bishop, Brierly, Briggs, Brownlie, Castren, Clark, Donnelly, Farer, Franck, Friedmann, Goodrich, Green, Hambro, Jessup, Jiminez de Arechaga, Kelsen, Lauterpacht, McHugh, Rodley, Schwartzenberger, Sorensen, von Glahn, and Waldock.[78] Those who do support the doctrine—Lillich, McDougal, Moore, Nanda, Reismann, and Stone—usually do so as a moral not a legal right, or they do subject to a condition that incorporates another basis for justifying the use of force, such as invitation or UN Security Council authorization.[79] In a 1985–86 report, the International Law Association's American Branch concluded that "governments by and large (and most jurists) would not assert a right of forcible intervention to protect the nationals of another country from atrocities carried out in that country."[80]

In light of the current status of the doctrine or right of humanitarian intervention, it is not surprising that agreement does

not exist on the conditions that must be satisfied for the legitimate use of armed force in this regard. What follows is a brief listing of *possible* conditions for humanitarian intervention with the name of the jurist or scholar advocating the requirement in parentheses.

The action must be taken in response to threats to another's nationals (this writer). If the action were to protect one's own nationals, then that doctrine and not humanitarian intervention would apply.

The action must be taken in response to an immediate and extensive threat to fundamental human rights, particularly a threat of widespread loss of human life that shocks the conscience of mankind (Brierly, Lillich, Maizel, Moore, and the International Commission of Jurists).

The action must be proportional (Lillich, Moore, Nanda, and the International Commission of Jurists). It is difficult to understand how this condition will be applied in these circumstances. How does one rescue an entire population from its own government? Can this be achieved without replacing the government in power?[81]

The action must have a minimal effect on the established government (Moore). See condition 3 above.

A prompt disengagement must take place when the purpose of the action has been accomplished (Lillich, Moore, Nanda, and the International Commission of Jurists).

The action must be immediately reported to UN Security Council and appropriate regional organizations (Moore and the International Commission of Jurists).

The action requires an invitation from a recognized government (Brierly, Brownlie, Lillich, and Nanda). If there is an invitation, then there is no intervention. Invitation alone will justify the use of force abroad. None of the other conditions for humanitarian intervention are required in such circumstances.

The action must be for a limited duration (Lillich and Nanda).

The action must be taken as a last resort (Lillich, Nanda, and the International Commission of Jurists).

The state invoking the coercive measures must be acting with relative disinterestedness and impartiality (Brierly, Maizel, and

Lillich). This condition focuses on whether the intervening state is more interested in human rights than it is in self-interest and power.

The international community must have had an opportunity to verify the factual circumstances and be given an opportunity to solve the problem (Brierly, Maizel, and the International Commission of Jurists).

The state contemplating intervention must first make a demand on the territorial state concerned to remedy the problem; the territorial state must be given every opportunity and every encouragement to act effectively to correct the situation; and the territorial state must be unwilling or unable to act (Brierly, Maizel, and the International Commission of Jurists).

The action must be taken in accordance with rules and procedures set forth in the UN Charter, chapters VII or VIII (Brownlie). Like invitation, if this condition is satisfied, then it alone would legitimate the use of force. None of the other conditions for humanitarian intervention are required in such circumstances.

The action must be taken outside of national territorial jurisdiction of any state, for example, against pirates on the high seas or in Antarctica or areas with a similar regime (Brownlie). Obviously, if the action is taken "outside of national territorial jurisdiction," then no intervention occurs. Additionally, concerning pirates (as we shall see below), separate authority exists.[82]

Hot Pursuit

The doctrine of hot pursuit is part of the law of the sea. It is overwhelmingly accepted as part of customary international law and it has been codified in article 23 of the 1958 Geneva Convention on the Law of the High Seas.[83] The doctrine legitimates the use of force in very narrow circumstances that could have application in dealing with international terrorism. The conditions underlying the doctrine are well settled.

The hot pursuit must begin within the pursuing state's territory and continue out into the high seas or in the air above. There

is no analogous doctrine of hot pursuit on land. If pursued on land, the justification must be under some other legal theory, such as, for example, self-defense.[84] (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 1.)

The pursuing state must have good reason to believe that the ship has violated its laws and regulations while within its territory. The term *ship* in this instance refers to seagoing vessels and to aircraft. The laws or regulations violated may be any law or regulation not limited to criminal, fisheries, custom, shipping, or neutrality. The territory of the coastal state includes its internal waters, territorial waters, and contiguous zone as well as the airspace above. However, violations within the territorial zone are limited to rights for the protection of that zone. (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 1.)

Hot pursuit can begin only after a signal to stop has been given. The signal may be either audible or visual but it must be given at a distance to enable it to have been received. (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 3.)

The pursuit must be continuous. Pursuit that is interrupted cannot be *hot* pursuit. Once interrupted pursuit cannot be reestablished. (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 1.)

The hot pursuit must cease when the ship enters the territorial waters of another state. (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 1.) Bowett indicates that there may be one possible exception to this rule "in that the pursuit of pirate vessels can be continued within the territorial waters of another state if that state is not in a position to take up the pursuit itself; even then it is suggested that the right of trial devolves on the territorial state within whose waters capture is effected."[85]

Hot pursuit may only be effected by warship or military aircraft. (1958 Geneva Convention on the Law of the High Seas, art. 23, para. 4.)

Piracy: What Is It?

In the late 1700s and early 1800s piracy, along with slave trading, was made an international crime. Consequently, pirates

became *hostis humani generis* (enemies of the human race) subject to a universal criminal jurisdiction. Any nation could prosecute and punish piracy. If a nation did not wish to prosecute, then it had an obligation to extradite pirates to states that would. There were no safe havens. Contemporary international law (both custom and treaty) firmly recognizes the continued application of this law today.

Although military force may properly be directed at pirates, the concept of piracy is a very narrow one indeed. Originally it comprised the commission of the felony of robbery on the high seas. By the twentieth century several additional requirements had arisen.[86] According to the Geneva Convention on the Law of the High Seas, article 15, piracy requires all of the following:

1. *The act must comprise illegal violence, detention or depredation.*
2. *The act must be committed for private end.* It cannot be an act committed for public purpose or for political reasons.
3. *The act must occur on the high seas.* It must not occur within the jurisdiction of any state.
4. *The act must take place from one private ship to another private ship.* A ship in this context includes seagoing vessels and aircraft. There must be two ships, one from which the act is committed and the other which is the object of the illegal act. If seizure of a ship occurs from within, then it may be viewed as a hijacking but it is not piracy. If a public vessel is involved, the offense of piracy does not arise either.

As should be evident from the foregoing analysis, the law pertaining to piracy will not be very useful in dealing with terrorism. The 1986 *Achille Lauro* incident was not piracy for two reasons: it was not committed for private ends nor did it take place from one private ship to another. In recognition of this fact, Italian authorities did not charge the *Achille Lauro* terrorists with piracy. It charged them with murder, kidnapping, and various weapons offenses.[87] Interestingly enough the sinking of the *Rainbow Warrior* in New Zealand waters in 1985 was not piracy either since the act against the Greenpeace vessel was carried out by French public officials.

Many have criticized the modern law of piracy as having failed to control terrorism by having failed "to adequately control politically motivated crimes."[88] Some scholars have suggested that the law be rewritten. Because of the very political nature of terrorism, it is highly unlikely that politically motivated crimes will ever be considered as piracy. This is not a failure of international law, rather it is a lack of community consensus to develop the law further. The concept of piracy does offer hope. It is one instance in which the international community did agree that an international crime should be established, albeit narrowly. The key question is: Will the community of nations ever develop the will to treat terrorism as an international crime, thereby branding terrorists as enemies of the human race?

Self-Help: A Bona Fide Precept?

Self-help is the exercise of military force by states for the purpose of enforcing legal rights; but forcible self-help is not a response to threatened or actual attack, as is self-defense. Self-help is an attempt to secure legal rights that are threatened. As British international law scholar Rosalyn Higgins writes, "Self-defence . . . aims at the restoration of the *status quo*, whereas self-help has a 'remedial or repressive character in order to enforce legal rights'."[89]

Great Britain argued self-help with respect to its minesweeping operations in Albanian waters in the Corfu channel case.[90] The International Court of Justice rejected the British argument that its position was justified in order to preserve evidence and to keep an international sea-lane open. In 1956 Britain argued, in part, that its actions with regard to the Suez Canal were necessary to protect valuable British property and to protect the general right of passage through the canal. These self-help arguments were rejected by the United Nations and the international community generally.[91] In 1968 Israel argued that its raid on Beirut "was taken to uphold Israel's basic right of free navigation in international skies."[92] The United Nations rejected this position.

The general view of the international community is that self-help as a justification for military action is not an established norm of international law. Self-help amounts to taking the law into one's own hands. There is no imminent or actual armed attack or other justifying circumstance and, therefore, the UN Charter mandates that peaceful settlement of disputes is the proper course of action. In short, not all failures in state responsibility will legitimate a forcible response.

Although enforcement of a legal right is clearly one condition for self-help, it would not be meaningful to attempt to identify all the conditions for self-help. For even if all the conditions for self-help could be satisfied, self-help actions themselves cannot legitimate the use of armed force.

Summary

This chapter surveys seven potential legal justifications for the use of force. Four are highly acceptable to the international community as a legal basis for the legitimate use of arms. They are invitation, protection of one's own nationals, hot pursuit, and piracy. The first three of these offer promise for dealing with international terrorism. Piracy is not helpful because its narrow definition excludes acts of terrorism.

The remaining justifications of peacetime reprisal, humanitarian intervention, and self-help have a low acceptance level as legal norms. Any state relying on these arguments to support military action substantially increases the probability that its actions will be condemned by the international community including its own allies and close supporters.

NOTES

1. See J. E. S. Fawcett, "Intervention in International Law: A Study of Some Recent Cases," *Recueil des Cours* 103, pt. 2 (1961): 365–67; Noemi Gal-Or, *International Cooperation to Suppress Terrorism* (New York: St. Mar-

tin's Press, 1985), 149; and Department of State, Office of the Legal Adviser, *Digest of International Law*, vol. 12, ed. Marjorie M. Whiteman (August 1971), 208, State Department, 8586.

2. See Benjamin Netanyahu, "Terrorism: How the West Can Win," *Time*, 14 April 1986, 57; and Detlev F. Vagts, "International Law under Time Pressure: Grading the Grenada Take-Home Examination," *American Journal of International Law* 78, no. 1 (January 1984): 171.

3. Rosalyn Higgins, "The Legal Limits to the Use of Force by Sovereign States: United Nations Practice," in *British Year Book of International Law, 1961*, vol. 37 (Oxford, England: Oxford University Press for Royal Institute for International Affairs, 1962), 310.

4. Ibid., 309.

5. Oscar Schachter, "In Defense of International Rules on the Use of Force," *University of Chicago Law Review* 53, no. 1 (Winter 1986): 118–19.

6. Sir Paul Scoons, *The Economist*, 10 March 1984, 34. See also remarks of Domingo E. Acevedo, principal legal officer of the General Secretariat of the Organization of American States (OAS), "The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?" in American Society of International Law, *Proceedings of the 78th Annual Meeting*, 12–14 April 1984 (Washington, D.C.: 1984), 72; Francis A. Boyle et al., "International Lawlessness in Grenada," *American Journal of International Law* 78, no. 1 (January 1984): 172–74; George Bunn, "International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?" *Naval War College Review* 39, no. 3 (May–June 1986): 72; Christopher C. Joyner, "The United States Action in Grenada: Reflections on the Lawfulness of Invasion," *American Journal of International Law* 78, no. 1 (January 1984): 131-32; Capt Samuel R. Maizel, USA, "Intervention in Grenada," *Naval Law Review* 35 (Spring 1986): 47–86; John Norton Moore, "Grenada and the International Double Standard," *American Journal of International Law* 78, no. 1 (January 1984): 145–68; and Vagts, 171.

7. See Oscar Schachter, "Self-Help in International Law: U.S. Action in the Iranian Hostage Crisis," *Journal of International Affairs* 37, no. 2 (Winter 1984): 244, n. 12.

8. Sir Hersch Lauterpacht, ed., *Oppenheim's International Law*, 7th ed., vol. 2 (London: Longman's, Green and Co., 1952), 136–37.

9. Gerhard von Glahn, *Law Among Nations*, 3d ed. (New York: Macmillan Publishing Co., 1976), 496. See also G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law," *Recueil des Cours* 92, pt. 2 (1957): 119–20.

10. See Fitzmaurice, 119–20; Lt Comdr Michael Franklin Lohr, USN, "Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism," *Naval Law Review* 34 (1985): 47; and Gayle Rivers, *The War against the Terrorists: How to Win It* (New York: Stein and Day, 1986), 184–85.

11. See von Glahn, 498–500.

12. Ibid., 497. See also William W. Bishop, Jr., *International Law: Cases and Materials*, 2d ed. (Boston: Little, Brown and Co., 1962), 747–48.

13. James L. Brierly, *The Law of Nations*, 6th ed., ed. Sir Humphrey Waldock (New York: Oxford University Press, 1963), 400.

14. Ibid., 401. See United Nations, "Naulila International Arbitration Concerning the Responsibility of Germany for Damage Caused in the Portuguese Colonies of South Africa," Portuguese-German Arbitral Tribunal, 1928, *Reports on International Arbitral Awards*, 2d sess., 1949. See also Fitzmaurice, 119–20; James J. McHugh, "Forcible Self-Help in International Law," *US Naval War College International Studies* 62 (1980): 145; Jeffrey A. Sheehan, "The Entebbe Raid: The Principle of Self-Help in International Law as Justification for State Use of Armed Force," *Fletcher Forum* 1 (Spring 1977): 140; and von Glahn, 500.

15. Sir Hersch Lauterpacht quoted in *The Law of Nations*, 6th ed., ed. Herbert W. Briggs (New York: Appleton-Century-Crofts, 1966), 958. See also Lauterpacht, *Oppenheim's Law*, vol. 2:136–37; Max Sorensen, *Manual of Public International Law* (New York: St. Martin's Press, 1968), 754; and von Glahn, 496–97.

16. See D. W. Bowett, *Self-Defence in International Law* (New York: Frederick A. Praeger, 1958), 13; Briggs, 958; Richard A. Falk, "The Beirut Raid and the International Law of Retaliation," *American Journal of International Law* 63, no. 3 (July 1969): 431; Lt Comdr Bruce Harlow, USN, "The Legal Use of Force . . . Short of War," US Naval Institute, *Proceedings* 92, no. 11 (November 1966): 90; Higgins, 314; Richard B. Lillich, "Forcible Self-Help under International Law," *US Naval War College International Law Studies* 62 (1980): 131; Lohr, 30–31; and Lauterpacht, *Oppenheim's Law*, vol. 2:136–37.

17. Derek Bowett, "Reprisals Involving Recourse to Armed Force," *American Journal of International Law* 66, no. 1 (January 1972), 3–4. See also Edward A. Lynch, "International Terrorism: The Search for a Policy," *Terrorism: An International Journal* 9, no. 1 (1986): 65; Schachter, "Self-Help," 233–34; and Department of State, Office of the Legal Adviser, *Digest of United States Practice in International Law, 1979*, ed. Marian Lloyd Nash (Washington, D.C.: 1983), 1751, State Department, 9374.

18. See Falk, 431; Harlow, 90; Lillich, 131; Lohr, 30–31; and Sorensen, 753.

19. Von Glahn, 496–97. See also Lauterpacht, *Oppenheim's Law*, vol. 2:322.

20. See Briggs, 958.

21. See Falk, 431; Harlow, 90; Lillich, 131; Lohr, 31; Sorensen, 753; and von Glahn, 496–97.

22. See von Glahn, 496–97.

23. See Fitzmaurice, 119–20; and Lauterpacht, *Oppenheim's Law*, vol. 2:321.

24. See von Glahn, 496–97.

25. See, for example, UN General Assembly, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States," 24 October 1970, Resolution 2526, Official Records (UN GAOR), 25th sess., supp. 28, A/8028 (1970), 121. See also Bowett, "Reprisals," 1; and Sorensen, 754. Lt Col James P. Terry, USMC, writes that not only did the US vote for the General Assembly resolution on friendly relations in 1970, but the United States "has gone on record in stating that it considers reprisals to be unlawful in contrast to acts of lawful self-defense." Terry, "An Appraisal of Lawful Military Response to State-Sponsored Terrorism," *Naval War College Review* 39, no. 3 (May–June 1986): 65.

26. See Falk, 417; Harlow, 90; Higgins, 314; Lillich, 132; and "Resort to War and Armed Force: Reprisals" (US *Digest*, chap. 14, sec. 1), Contemporary Practice of the United States Relating to International Law, *American Journal of International Law* 80, no. 1 (January 1980): 166.

27. Bowett writes, "*Reprisals* involving the use or threat of force are generally considered to be illegal." Bowett, *Self-Defence*, 13. James L. Brierly notes that "today it is beyond argument that armed reprisals . . . would be flagrant violations of international law." Quoted by Lillich, 132. See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford, England: Oxford University Press, 1963), 281–82. Brownlie also writes that the "provisions of Article 2, paragraph 4, of the United Nations Charter have finally prohibited reprisals involving the use of force." Brownlie, "The Use of Force in Self-Defence," in *British Year Book*, vol. 37:197. Falk writes (p. 429), "It does seem appropriate to conclude that the U.N. Charter prohibits all forms of forcible self-help other than the exercise of self-defense within the meaning of Article 51." Harlow writes (p. 91), "It is submitted that the better view, and one deserving United States support and adherence, is that reprisals, involving the use of force, are illegal in any situation short of a legal state of war." Rosalyn Higgins (p. 314) writes, "It is now generally considered that reprisals involving the use or threat of force are illegal." Myres McDougal and Florentino P. Feliciano write, "It may suffice to register that we share the common view that the prescriptions and policies embodied in the U.N. Charter forbid the unilateral use of force and violence by way of reprisal." McDougal and Feliciano, *Law and Minimum World Public Order* (New Haven, Conn.: Yale University Press, 1961), 208. Quincy Wright writes, "it was the object of Article 2, paragraphs 3 and 4, of the Charter to eliminate all military reprisals from international relations." Q. Wright, "The Goa Incident," *American Journal of International Law* 56, no. 3 (1962): 628.

28. Acting Secretary of State Kenneth Rush, letter, 29 May 1974, to Yale law professor Eugene Rostow reprinted in Department of State, Office of the

Legal Adviser, *Digest of United States Practice in International Law, 1974*, ed. Arthur W. Rovine (Washington, D.C.: 1975), 700, State Department, 8809.

29. 16 February 1979 opinion of Julia W. Willis quoted in *Digest of US Practice, 1979*, 1752. See also Schachter, "Self-Help," 245.

30. See Yehuda Blum, *State Terrorism and the International System*, Proceedings of the International Security Council, Tel Aviv, Israel, 26–28 January 1986 (New York: CAUSA International, 1986), 43–44; and Falk, 429.

31. See Falk, 438–40.

32. Falk (pp. 441–42) suggests the following 12 principles: (1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries; (2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence; (3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation; (4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organizations; (5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians; (6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel; (7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action; (8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed; (9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state; (10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of the adversary; (11) That the pattern of conduct of which the retaliatory use of force is an instance exhibits deference to considerations 1–10, and that a disposition to accord respect to the will of the international community be evident; and (12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government has given to terroristic enterprises. These guidelines are criticized by Yehuda Z. Blum, "The Beirut Raid and the International Double Standard," *American Journal of International Law* 64, no. 1 (January 1970): 94 and 104.

33. See Bowett, "Reprisals," 33–36.

34. Ibid., 10–11.

35. See Air Force Pamphlet (AFP) 110-31, *International Law—The Conduct of Armed Conflict and Air Operations*, November 1976, para. 10-7; Naval

Warfare Instruction Publication (NWIP) 10-2, *Law of Naval Warfare*, para. 300; and Harlow, 90-91.

36. Philip C. Jessup, *A Modern Law of Nations*, vol. 1 (New York: Macmillan Co., 1948), 169-70.

37. Judge Max Huber quoted by Bowett, *Self-Defence*, 87. See also Netanyahu, 52.

38. See Slaughterhouse cases, 16 Wall. 36 (1873) and *Luria v. United States*, 231 US 9 (1913).

39. Ian Brownlie quoted by Lohr, 7. See also Bowett, *Self-Defence*, 92.

40. See Bunn, 72; John R. D'Angelo, "Resort to Force by States to Protect Nationals: The U.S. Rescue Mission to Iran and Its Legality under International Law," *Virginia Journal of International Law* 21, no. 3 (1981): 485-519; L. C. Green, "International Law and the Control of Terrorism," *Dalhousie Law Journal* 7, no. 2 (April 1983): 249; Maizel, 60; Moore, 153-54; and Jordan J. Paust, "Entebbe and Self-Help: The Israeli Response to Terrorism," *Fletcher Forum* 2, no. 1 (January 1978): 91.

41. See D'Angelo, 498; and *Digest of International Law*, vol. 12:192.

42. Concerning United States Diplomatic and Consular Staff in Tehran (*United States v. Iran*), merits, 1980 ICJ 3. See also Maizel, 60; and Ted L. Stein, "Contempt, Crisis, and the Court: The World Court and the Hostage Rescue Attempt," *American Journal of International Law* 76, no. 3 (July 1982): 499-531.

43. Ambassador Vernon Walters quoted in Department of State, "US Exercises Right of Self-Defense against Libyan Terrorism," *Department of State Bulletin* 86, no. 2111 (June 1986): 21. See also Department of State, "Counterterrorism Policy," statement of John Whitehead, deputy secretary of state, before the House Committee on Foreign Affairs, Washington, D.C., 22 April 1986, Current Policy 823, 2.

44. Rivers, 24.

45. See Abraham D. Sofaer, "The War Powers Resolution and Antiterrorist Operations," *Department of State Bulletin* 86, no. 2113 (August 1986): 71.

46. See Bowett, *Self-Defence*, 95.

47. Ibid., 88. See also Col Dennis M. Corrigan, USA, "Legal Use of Military Force to Counter Terrorism," strategic study no. 86-1 E-85 (Washington, D.C.: National War College, February 1986), 12-13; Maizel, 57-58; Moore, 154; and Sir Humphrey Waldock quoted in *Digest of International Law*, vol. 12:198.

48. Fitzmaurice, 172-74.

49. See Bowett, *Self-Defence*, 88.

50. See Thomas R. Krift, "Self-Defense and Self-Help: The Israeli Raid on Entebbe," *Brooklyn Journal of International Law* 4, no. 1 (Fall 1977): 56.

51. See Corrigan, 12-13.

52. Stein, 523.

53. Oscar Schachter, "The Right of States to Use Armed Force," *Michigan Law Review* 82 (April–May 1984): 1631.

54. Bowett, *Self-Defence*, 89. See also Moore, 154; Schachter, "International Rules," 139; and Sir Humphrey Waldock, "The Regulation of the Use of Force by Individual States in International Law," *Recueil des Cours* 81, pt. 2 (1952): 467.

55. Fitzmaurice, 172–74.

56. The *Mayaguez* mission has been criticized because of a lack of necessity for the operation. See D'Angelo, 503; and Paust, 91. The existence of necessity has led to approval of the Entebbe rescue mission; see Francis Anthony Boyle, *World Politics and International Law* (Durham, N.C.: Duke University Press, 1985), 18–20; Green, 249; and Office of the Legal Adviser, *Digest of United States Practice in International Law, 1976*, ed. Eleanor C. McDowell (Washington, D.C.: 1977), 150–51, State Department, 8908.

57. See Bowett, *Self-Defence*, 101–3.

58. Ibid., 102. Bowett (p. 93) also writes, "In practice it cannot be said that a threat to the safety of nationals abroad constitutes a threat to the security of the state. Obviously, to imperil the safety of a single national abroad is not to imperil the security of the state; and yet there may be occasions when the threat of danger is great enough, or wide enough in its application to a sizable community abroad, for it to be legitimately construed as an attack on the state itself." See also Harlow, 96.

59. Lord McNair quoted in *Digest of International Law*, vol. 12:3. See also Corrigan, 12–13; Fawcett, 404–8; Harlow, 96; Maizel, 59; Moore, 154.

60. See Fawcett, 404–8.

61. Schachter, "The Right of States," 1630. See also Krift, 58; Maizel, 63; McHugh, 152; Moore, 154; and Sir Humphrey Waldock quoted in *Digest of International Law*, vol. 12:198.

62. Tom J. Farer, "Law and War," chap. 2 in *The Future of the International Legal Order*, ed. Cyril E. Black and Richard A. Falk, vol. 3, *Conflict Management* (Princeton, N.J.: Princeton University Press, Center for International Studies, 1971), 55.

63. E. Stowell writing in 1913, quoted by D'Angelo, 485.

64. Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics," *Journal of International Affairs* 37, no. 2 (Winter 1984): 313.

65. See Harlow, 96; Lillich, 232; and von Glahn, 167.

66. See Thomas M. Franck and Nigel S. Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force," *American Journal of International Law* 67, no. 2 (April 1973): 277–83; Harlow, 97; Lillich, 232; and von Glahn, 168.

67. Franck and Rodley, 285.

68. Sir Hartley Shawcross quoted by Green, 177.

69. Ian Brownlie quoted in *Digest of International Law*, vol. 12:204–5; Roger S. Clark, "Humanitarian Intervention: Help to Your Friends and State Practice," *Georgia Journal of International and Comparative Law* 13, supp. (1983): 211; and Donnelly, 312.

70. See Michael Akehurst, "Humanitarian Intervention," chap. 7 in *Intervention in World Politics*, ed. Hedley Bull (Oxford, England: Clarendon Press, 1984), 105–6; Donnelly, 317; Farer, 55; and Maizel, 65–66.

71. See Franck and Rodley, 285–86, 278; and von Glahn, 168.

72. Clark, 213.

73. Lillich, 230.

74. See UN Security Council, Official Records (UN SCOR), 26th year, 1606th meeting, 15.

75. Franck and Rodley, 290. See also Donnelly, 321.

76. See Akehurst, 97–99; and Franck and Rodley, 290–98.

77. See UN General Assembly, "Declaration on Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Political Independence and Sovereignty," 21 December 1965, Resolution 2131, UN GAOR, 20th sess., supp. 14, A/6014 (1965), 11; UN General Assembly, Resolution 2625, 121; and UN General Assembly, "Definition of Aggression," Resolution 3314, UN GAOR, 29th sess., supp. 31, A/9631 (1974), 142.

78. See Brierly, 403; Ian Brownlie, "Humanitarian Intervention," chap. 10 in *Law and Civil War in the Modern World*, ed. John Norton Moore (Baltimore, Md.: Johns Hopkins University Press, 1974), 225; Franck and Rodley, 300 and 304; Green, 178; Maizel, 65; McHugh, 145–46; Moore, 154; Schachter, "The Right of States," 1629; Sorensen, 758–59; and von Glahn, 165–66.

79. See Lillich, 241.

80. "Report of the Committee on Use of Force in Relations among States," in International Law Association (ILA), American Branch, *1985–86 Proceedings and Committee Reports* (New York: International Law Association, American Branch, 1986), 199.

81. See Akehurst, 105; and Donnelly, 318.

82. See Brierly, 427–28; Brownlie, "Humanitarian Intervention," 225-27; Donnelly, 314; Secretariat of the International Commission of Jurists, *The Events in East Pakistan, 1971, A Legal Study* (1972), 95; Richard Lillich, 136–37; Maizel, 64; John Norton Moore's proposed guidelines in ILA, "Report of the Committee on Human Rights," in *Report of the Fifty-Fourth Conference Held at The Hague* (Great Britain: ILA, 1970), 15; and Ned Nanda, "The United States' Action in the 1985 Dominican Crisis: Impact on World Order—Part I," *Denver Law Journal* 43 (1966): 475.

83. "Geneva Convention on the Law of the High Seas," art. 23, 29 April 1958, TIAS 5200, UST, vol. 13, pt. 2, 2312; UNTS, vol. 450 (1963), no. 6465, 82. See also Ian Brownlie, "Use of Force," 248; and Glanville L. Williams, "The Judicial Basis of Hot Pursuit," *British Year Book of Interna-*

tional Law, 1939, vol. 20 (Oxford, England: Oxford University Press, Royal Institute of International Affairs, 1939), 83, 92–93.

84. See John C. Bender, "Self-Defense and Cambodia: A Critical Appraisal," *Boston University Law Review* 50 (Spring 1970): 130; Bowett, *Self-Defence*, 32; and Manuel R. Garcia-Mora, *International Responsibility for Hostile Acts of Private Persons against Foreign States* (The Hague, Netherlands: Martinus Nijhoff, 1962), 121.

85. Bowett, *Self-Defence*, 83.

86. See George R. Constantinople, "Toward a New Definition of Piracy: The *Achille Lauro* Incident," *Virginia Journal of International Law* 26, no. 3 (1986): 724–37; Nancy Douglas Joyner, *Aerial Hijacking as an International Crime* (Dobbs Ferry, N.Y.: Oceana Publications, 1974), 29; Alfred P. Rubin, "Current Legal Approaches to International Terrorism," *Terrorism: An International Journal* 7, no. 2 (1984): 148; and Paul A. Tharp, Jr., "The Laws of War as a Potential Legal Regime for the Control of Terrorist Activities," chap. 6 in *International Terrorism: Current Research and Future Directions*, ed. Alan D. Buckley and Daniel D. Olson (Wayne, N.J.: Avery Publishing Co., 1980), 81.

87. See R. W. Barnett, "The U.S. Navy's Role in Countering Maritime Terrorism," *Terrorism: An International Journal* 6, no. 3 (1983): 470; and Scott C. Truver, "Maritime Terrorism, 1985," US Naval Institute, *Proceedings* 112 (May 1986): 167.

88. Abraham D. Sofaer, "Terrorism and the Law," *Foreign Affairs* 64, no. 5 (Summer 1986): 910.

89. Higgins, 313. See also Falk, 429; Krift, 43–62; Lillich, 129–38; McHugh, 139–63; Schachter, "Self-Help," 231–46; and Sheehan, 135–53.

90. Corfu channel case (*United Kingdom v. Albania*), merits, 1949 ICJ 4. See D'Angelo, 502; Farer, 52; and Waldock, "Regulation of Force," 468.

91. See Farer, 53.

92. See Blum, 76–77.

CHAPTER 7

USE OF MILITARY FORCE: TERRIBLE SWIFT SWORD OR LAME WARNING?

> All applications of force start from the philosophical premise that they are suspect.
>
> Capt James J. McHugh, USN

> No one, it is safe to say, is satisfied with the present state of international law on the use of force. . . . Yet a stable society of sovereign states cannot exist if each is free to destroy the independence of the other.
>
> Prof Oscar Schachter

In what legal ways can armed force be used abroad to deal with international terrorism and its state sponsors and supporters? Force is not an ordinary but an extraordinary remedy, and thus is not generally available. Armed force has been used in the past and will be used in the future by states. In the contemporary world, use of force is restricted to a limited number of circumstances. These circumstances, reflecting the practice of states and the United Nations Charter system, provide the basis for the international rules regarding the legitimate use of force today.

A state must consider many intertwined factors before using armed force abroad. These include, for example, general foreign policy considerations, military capability, public support at home and overseas, availability of intelligence, target identification, acceptability of risk (such as escalation, collateral civilian damage and injury, terrorist retaliation, nonsupport from allies, and taking of hostages), and the international rule of law. International law does not preclude a nation from responding to an international terrorist threat with armed force, but it does require that such a response be in conformity with accepted international practice. The United States and other Western democracies are bound by and committed to international law. It has a moral claim on us and we are legally subject to it. The rule of law is an essential ingredient in our democratic value system.

Before authorizing the use of armed force, international law requires that decisionmakers consider the following issues: What is the threat? How serious is the threat? Are another state's actions or inactions fostering or encouraging the threat in derogation of state responsibility? Does the failure of state responsibility authorize the injured state to intervene with armed force into the territory of the injuring state? Is the use of force to occur in a peacetime or armed conflict context? If use of armed force is contemplated, then what legal rationale or argument justifies or legitimates the action?

This study has considered each of these issues in terms of state-sponsored international terrorism. Chapter 1 examined the threat. United States policymakers have identified international terrorism as a "threat to national security."[1] They base their assessment not on the frequency of incidents but rather on other unique features of terrorism itself, and they articulate this position persuasively. However, much needs to be done to convey the message of the significance of the threat of international terrorism to the American people and to the democratic world at large. International terrorism must be shown to be more than a threat to individuals and their property, as serious as that threat may be. International terrorism must be clearly understood for what it is—a basic threat to democratic institutions and values.

International law offers two approaches to dealing with state-sponsored international terrorism: the law enforcement approach and the law of armed conflict approach. Chapter 2 compared and contrasted these approaches. The selection of an approach should be based on the nature and seriousness of the threat to be managed. In choosing an approach to international terrorism, two fundamental questions should be answered: Can the threat best be met by treating state-sponsored international terrorism as a police or as a military responsibility? Can the threat better be met by force used in a peacetime or in an armed conflict context?

The United States and other like-minded democratic states have stated their preference for the law enforcement approach. They have opted to deal with international terrorism as essentially a police function and to characterize use of armed force abroad as

taking place in a peacetime context. This choice has been made, however, without a thorough consideration of the law of armed conflict.

Applying the law of armed conflict to international terrorism will not decriminalize terrorist acts nor will it give terrorists the status of privileged combatants. More specifically it will not entitle them upon capture to prisoner of war (POW) status. The law of armed conflict offers great potential in dealing with terrorism. It treats international terrorism as a mode of warfare but condemns terrorism as a method of warfare. It universalizes the crimes of terrorists. It authorizes certain conduct (such as armed reprisal) not permitted in a peacetime context. It would justify more easily the use or threatened use of armed force and, by conceptualizing terrorism in an armed conflict mode, would assist in developing military doctrine, strategy, tactics, and rules of engagement for combating terrorism.

There are two difficulties with the law of armed conflict approach. First, this approach would require a recognition of a state of armed conflict, which may be politically unacceptable. Second, it would require rethinking the unthinkable: The law enforcement approach to terrorism is sacrosanct. Assumptions about terrorism and about the law enforcement approach are unquestioned, although they should be challenged, discussed, and reconsidered. The unwillingness of top decisionmakers in the United States and Western Europe to question the law enforcement approach makes a serious review of the law of armed conflict approach highly unlikely but perhaps not impossible. In his annual report to Congress for fiscal year 1988, Secretary of Defense Caspar Weinberger wrote these encouraging words: "When terrorism is sponsored by the leaders of sovereign states as a tool of aggression, however, it moves beyond the realm of an internal police matter to a higher level—that of international conflict involving state-to-state confrontation."[2]

Against whom should the force be directed? As we have seen, states may be involved with international terrorism in varying degrees. They may be sponsors or supporters. Or they may be unwilling or unable to deal with terrorists. Some kinds of involve-

ment will legitimate the use of force against these states as well as the terrorists, while other involvement will justify only forcible action against the terrorists. Other kinds of involvement will authorize only demands that the responsible government pay damage claims. The United States should consider pursuit of monetary claims where appropriate in circumstances where states fail to perform prescribed international duties.

The doctrine of state responsibility discussed in chapter 3 also has been neglected; it deserves much greater attention. Where the doctrine of state responsibility authorizes use of military force against both the state and international terrorists, it will be necessary to establish the appropriate link between them by sufficient evidence. What constitutes sufficient evidence is judgmental. This evidence when presented in the appropriate world forum should persuade both the public at home and the international community of the propriety of the action. Acquiring evidence and being able to release it while protecting sensitive sources, methods, and means of intelligence collection raise difficult problems. There is need for a serious review of the diverse body of United States law and regulations on this subject.

Even if the link of state involvement can be shown, projection of armed force abroad will depend additionally on whether intervention can be justified and whether a legal rationale for the use of force can be found. Force is not to be used for trivial purposes but only to maintain essential rights. National security is an essential right. Once again, the nature and seriousness of the threat of state-sponsored international terrorism becomes extremely relevant. Is the threat of state-sponsored international terrorism in the particular situation at hand a threat to national security? If the answer is negative, then intervention by armed force should not be seriously considered unless an invitation or request for assistance is received from the government in whose territory the exercise of armed force is to take place.

Chapters 4–6 surveyed 13 legal arguments to support the permissible use or threatened use of force itself. This review demonstrates that self-defense offers the strongest legal basis for forcible action under the UN Charter and contemporary customary

international law. Self-defense includes individual self-defense, individual anticipatory self-defense, collective self-defense, collective anticipatory self-defense, and protection of one's own nationals. Albeit some elements of the international community will always question whether the facts prevailing at the time properly justified a reliance on self-defense, acting from an accepted legal precept is a different order of problem than trying to justify one's actions based upon a legal argument that, apart from the factual situation, is itself highly suspect. In the former case, the facts are at issue; in the latter case, both the facts and the law are at issue. Examples of legal arguments that are highly suspect are peacetime reprisal, humanitarian intervention, and self-help. These legal arguments do not enjoy widespread support in the international community nor have they been accepted by the United States as a proper basis for armed action.

Other legal arguments, such as piracy and hot pursuit, are accepted by the international community but are so narrowly defined as to be of limited usefulness in dealing with terrorism. Piracy, which is limited to illegal actions taken on the high seas from one private ship to another for private gain, appears inapplicable to the international terrorist situation.

Invitation is a unique legal argument because it, in effect, changes the legal relations among the parties. There is no issue of inviolability of territorial sovereignty nor of use of armed force against another state. The only real issue is the validity of the invitation itself. Regional peacekeeping actions offer a special opportunity to respond to terrorism in a collective manner if the will to act in concert exists and the other requirements for this kind of action can be satisfied. Because of the requirement of prior authorization of the UN Security Council, regional enforcement action, on the other hand, is not likely to be a viable option.

Appendix A identifies each of these legal arguments or options and their conditions. No matter which option is selected, certain fundamental minimum standards must be met.

1. The use of armed force must be strictly limited to the purpose authorizing its use in the first place. If in self-defense, then the action must be protective, not punitive. If to protect one's own

nationals, then the action must not seek to protect nationals of other countries or to reorder the domestic political system. If by invitation, then the action must be limited to the terms of the invitation and must be terminated when the invitation is withdrawn by proper authorities. An action based upon many legal arguments—such as the 1983 US action in Grenada, which was based on protection of one's nationals, regional peacekeeping, and invitation—not only broadens the purpose for which the armed force may be used but strengthens the overall case for a military presence.

2. The use of military force must be proportional to the injury suffered and the military objective sought. It must not be excessive. Only military targets may be subject to direct attack and collateral civilian damage and injury must be minimized.

3. The use of force must be as a last resort. Pacific remedies, if available, must be exhausted.

4. Report of the action must be made promptly to the appropriate world community organs.

These minimum standards, combined with the more specific conditions of a particular legal argument or option, will affect both the planning and execution of the military action including targets, tactics, and weapons used.

What, then, is the current situation? Terrorism is not an international crime. Terrorism per se is not outlawed although specific acts of terrorists are violations of the laws of most domestic legal systems. Some acts of terrorists, such as aerial hijacking, posting letter bombs, and violence directed at diplomats, are addressed in international law. But international law leaves prosecution and punishment to the domestic legal systems of nation-states. The extradition process, plagued by the political exception rule, has been less than effective. Terrorists receive much limelight, and far too few end up imprisoned for their violent acts of criminal misconduct.

A military response to international terrorists and their sponsors and supporters is limited by the legal arguments or options available in international law for the lawful use of armed force abroad. The presumption is against the legitimacy of military in-

tervention and the use of force. The state exercising the use of force has a heavy burden of proof if it is to show that its actions are justified in law. Fundamentally the acting state must persuade the world community and its public at home that, in the particular situation in which it acted, the harm that the intervention and the use of force inflicted on international order was not as great as the threat posed if international terrorism went unchecked. The basic underlying purpose of all law is to balance interests. For the present, the scales of international law may seem out of balance, favoring terrorism over intervention and a forcible response. But if this state of affairs exists, it does so only because the world community has not come to see terrorism as a threat so serious and compelling as to mandate a readjustment of the scales.

By electing a law enforcement approach to international terrorism, states that are victims of terrorism have reaffirmed the current balance of interests. These states have assessed international terrorism and found it to be essentially a challenge for civilian police authorities and not a type of armed conflict threatening the fiber of the international community. In these circumstances, use of military force as a terrible swift sword rarely will be legally justified and victim states will be reduced to issuing lame warnings about the use of military force that over time will have an adverse impact on the credibility of their response to the terrorist threat.

NOTES

1. Joint Chiefs of Staff. *United States Military Posture FY 1988* (Washington, D.C.: 1985), 93.

2. Department of Defense, *Annual Report to the Congress, Fiscal Year 1988: Report of the Secretary of Defense Caspar W. Weinberger to the Congress on the FY 1988/FY 1989 Budget and FY 1988–92 Defense Programs* (Washington, D.C.: 12 January 1987), 61.

APPENDIXES

APPENDIX A

USES OF ARMED FORCE CHECKLIST (LEGAL)

KEY

Option # : Potential legal basis for action.

Source: Origin of legal justification.

Article 38, Statutes of International Court of Justice (ICJ), identifies three origins of international law: *custom* (the practice of states accepted as legally required), *treaty* (bilateral and multilateral agreements ratified by states), and *general principles recognized by civilized nations* (common principles of law found in the domestic legal systems of states which can, therefore, be given international law application).

Acceptability: Degree to which international community has accepted legal justification in principle.

Ratings: high, moderate, or low.

Cross-reference: Location of explanatory text in this study.

Review text before using checklist!

Conditions: Requirements of legal justification that must be satisfied; all must be met.

Option 1: Individual Self-Defense

Source: Custom and treaty (UN *Charter*, art. 51)
Acceptability: High
Cross-reference: Chapter 4
Conditions:

1. The purpose of the action is to preserve the status quo, to be preventive and not punitive.
2. The action is in response to a prior unlawful act.
3. The action is taken to protect essential rights (generally considered to be national security interests).

4. The action is in response to an *actual* armed attack by another state or recognized international entity.
5. The response is timely, that is, in close proximity to the attack.
6. The action is taken as a last resort. All peaceful remedies have been exhausted. Remedies have been exhausted if unavailable or if fruitless to pursue.
7. The action is necessary. The situation is compelling requiring an immediate response to a great, direct, irreparable, and instant challenge.
8. The action is proportional both in response to the wrong suffered and the force employed to achieve the objective of the individual self-defense.
9. The action is reasonable, viewed in its entirety.
10. The measures taken are reported after the fact to the UN Security Council in accordance with article 51 of the Charter. (Intrinsic to this report is an admission of action in individual self-defense.)
11. The action is terminated promptly should the UN Security Council take effective measures to resolve the situation in accordance with article 51 of the Charter.

Option 2: Individual Anticipatory Self-Defense

Source: Custom and treaty (UN *Charter*, art. 51)
Acceptability: Moderate
Cross-reference: Chapter 4
Conditions:

1. The action is taken in response to an *imminent* armed attack by another state or recognized international entity.
2. The action conforms with conditions 1–3 and 5–11 of option 1, individual self-defense.

Option 3: Collective Self-Defense

Source: Custom and treaty (UN *Charter*, art. 51)
Acceptability: High
Cross-reference: Chapter 5
Conditions:

1. The purpose of the collective action is to preserve the status quo, to be preventive and not punitive.
2. The collective action is in response to a prior unlawful act directed at the injured or victim state.
3. The collective action is taken to protect essential rights of the injured or victim state (generally considered to be national security interests). It is not required that the assisting states take action to protect their essential rights.
4. The collective action is in response to an *actual* armed attack by another state or recognized international entity against a victim state. The actual armed attack need not be directed against the assisting state or states exercising the right of collective self-defense. But, assisting states may provide assistance only if the assisted state is, in fact, the victim state subject of actual armed attack.
5. The collective action in response must be timely, that is, in close proximity to the attack.
6. The collective action is taken as a last resort. All peaceful remedies must have been exhausted. Those remedies would be considered to have been exhausted if unavailable or if their pursuit would prove fruitless.
7. The collective action is necessary. The situation is compelling requiring an immediate response to a great, direct, irreparable, and instant challenge.
8. The collective action is proportional both in response to the wrong suffered and the force to achieve the objective of collective self-defense.
9. The collective action is reasonable, viewed in its entirety.

10. The measures taken are reported after the fact to the UN Security Council in accordance with article 51 of the Charter. (Intrinsic to this report is an admission of action in collective self-defense.)

11. The collective action is promptly terminated should the UN Security Council take effective measures to resolve the situation in accordance with article 51 of the Charter.

Option 4: Collective Anticipatory Self-Defense

Source: Custom and treaty (UN *Charter*, art. 51)
Acceptability: Moderate
Cross-reference: Chapter 5
Conditions:

1. The collective action is taken in response to *imminent* armed attack by another state or recognized international entity against a victim state. The imminent armed attack need not be directed against the assisting state or states exercising the right of collective self-defense. But assisting states may provide assistance only if the assisted state is, in fact, the victim state subject to imminent armed attack.

2. The collective action conforms with conditions 1–3 and 5–11 of option 3, collective self-defense.

Option 5: Regional Enforcement Action

Source: Custom and treaty (UN *Charter*, art. 53, chap. VIII)
Acceptability: High
Cross-reference: Chapter 5
Conditions:

1. The action is taken by a regional organization.

2. The action is taken for enforcement purposes. This condition presupposes the existence of something to enforce, such as, a binding decision of the UN Security Council.

3. No action is taken without prior approval of the UN Security Council in accordance with article 53 of the Charter.

4. In accordance with article 54 of the Charter, the UN Security Council is kept fully informed at all times of all aspects of the action, to include actions contemplated and undertaken.

Option 6: Regional Peacekeeping Action

Source: Custom and treaty (UN *Charter*, art. 52, chap. VIII)
Acceptability: High
Cross-reference: Chapter 5
Conditions:

1. The action is taken by a regional organization.

2. The action is taken for the purpose of restoring law and order in the face of a breakdown of public order. This is not an enforcement action. This is not a sanction action against a government.

3. In accordance with article 52, paragraph 1, of the Charter, the action taken must be consistent with the purposes and principles of the UN *Charter*, for example, furthering democratic elections, self-determination, and the like.

4. The action should not be conducted without an invitation from the established constitutional government. If such a government no longer exists due to civil disorder, then the requirement can be omitted.

5. In accordance with article 52, paragraph 2, of the Charter, the action is taken as a last resort. All peaceful remedies must have been exhausted. Remedies have been exhausted if unavailable or if fruitless to pursue.

6. In accordance with article 54 of the Charter, the UN Security Council is kept fully informed at all times of all aspects. This includes action contemplated or undertaken.

Option 7: Invitation

Source: Custom
Acceptability: High
Cross-reference: Chapter 6
Conditions:

1. The invitation is extended by a lawful government.
2. The official extending the invitation possesses the constitutional authority to do so.
3. The invitation is extended freely without coercion or intimidation.

Option 8: Peacetime Reprisal

Source: Custom
Acceptability: Low
Cross-reference: Chapter 6
Conditions:

1. The resort to armed force is taken without belligerent intent. The action is a peacetime response. There is no declaration of war and no intent to recognize a state of armed conflict.
2. The action is taken in response to the prior illegal conduct of another state or recognized international entity.
3. The purpose of the action is punitive not protective. Since the action occurs after the harmful attack or threat has passed, it cannot be protective.
4. The action is taken only after a demand has been made and the offending state has been given a reasonable time to make reparations or agree to correct its conduct. The demand must be publicized.
5. The action is taken as a last resort. Peaceful settlement efforts have failed to produce a remedy.
6. The action is halted as soon as the offending state makes reparations for its illegal conduct or agrees to cease further illegal practice.

7. The action must be proportional to the original injury suffered. It must be measured and not excessive to the wrong inflicted.
8. The action must be taken with due regard for third states.
9. The action must not be taken against protected persons, such as diplomats.
10. A reprisal may not be taken against a prior lawful reprisal.

Option 9: Protection of One's Own Nationals

Source: Custom and treaty (UN *Charter*, art. 51)
Acceptability: High
Cross-reference: Chapter 6
Conditions:

1. The action taken must be in behalf of one's own nationals.
2. The action must be necessitated by an unwillingness or inability of the territorial state to act to protect one's nationals as demanded by international law.
3. The action must be taken as a last resort. Peaceful remedies, including diplomatic initiatives, must have failed or proven inadequate to ensure protection.
4. There must be an immediate threat or danger to life or property of one's nationals.
5. The action taken must be to protect an essential right, such as national security interest, of the state which is indirectly threatened by the direct threat to one's nationals.
6. The action must be proportionate. The military measures taken must not be excessive to the threat or to the objective to be achieved.
7. The action must be strictly confined to protecting one's nationals.
8. The action must be protective and not punitive.

Option 10: Humanitarian Intervention

Source: Custom and treaty (human rights obligations)
Acceptability: Low
Cross-reference: Chapter 6
Conditions: Unsettled as to which may be required; following are conditions most frequently identified.

1. The action taken is in response to threats to another's nationals.
2. An immediate and extensive threat to fundamental human rights exists that shocks the conscience of mankind.
3. The use of force is proportional.
4. The action has a minimal effect on the authority structure of the territorial state.
5. The action is undertaken for a specific limited purpose and forces are withdrawn promptly when that purpose has been achieved.
6. The action is immediately reported to the UN Security Council and to appropriate regional international organizations.
7. The recognized government has extended an invitation to intervene.
8. The action is for a limited duration.
9. The action is taken as a last resort.
10. The intervening state must show relative disinterestedness by balancing the true humanitarian interest against self-interest and power concerns.
11. The international community has had an opportunity to verify the factual circumstances and has been given the opportunity to resolve the problem.
12. The action has been preceded by a demand on the territorial state to remedy the problem. The territorial state has been given every opportunity to act effectively but has failed to do so. The territorial state is unwilling or unable to act.

13. The action is in accordance with the rules and procedures of UN *Charter*, chapter VII or VIII.

14. The action is taken outside of the national territorial jurisdiction of any state, e.g., against pirates on the high seas or in Antarctica or areas with a similar regime.

Option 11: Hot Pursuit

Source: Custom and treaty (1958 Geneva Convention on High Seas, art. 23)
Acceptability: High
Cross-reference: Chapter 6
Conditions:

1. The hot pursuit must begin within the territory of the pursuing state and continue out onto the high seas or in the air above.

2. The pursuing state must have good reason to believe that the ship has violated its laws or regulations while within its territory.

3. The pursuit can begin only after a signal to stop has been given.

4. The pursuit must be continuous.

5. The pursuit must cease when the ship enters the territorial waters of another state.

6. Hot pursuit can be undertaken only by warships or military aircraft.

Option 12: Piracy

Source: Custom and treaty (1958 Geneva Convention on the High Seas, art. 15)
Acceptability: High
Cross-reference: Chapter 6
Conditions:

1. An illegal act of violence, detention, or depredation has taken place.
2. The illegal act must have been committed for private ends.
3. The illegal act must have occurred on the high seas and not within the territorial jurisdiction of any state.
4. The illegal act must have been committed from one private ship to another private ship.

Option 13: Self-Help

Source: Custom
Acceptability: Low
Cross-reference: Chapter 6
Conditions:

1. Action is taken to enforce a legal right.

[Because the acceptability level of this option is so low it is difficult to identify other conditions.]

APPENDIX B

UNITED NATIONS CHARTER (SELECTED ARTICLES)

SOURCE: "Charter of the United Nations," 26 June 1945, *Statutes at Large*, 1031; United States Treaty Series 993; Department of State, *Treaties and Other International Agreements, 1776–1949*, compiled under the direction of Charles I. Bevans, vol. 3, *1931–1949*, 1153; "Amendments to Articles 23, 27, and 67," 31 August 1965, *Treaties and Other International Agreements Series* (TIAS) 5857, *Treaties and Other International Agreements* (UST), vol. 16, pt. 2, 1134; United Nations Treaty Series (UNTS), *Treaties and Other International Agreements Reported or Filed and Recorded with the Secretariat of the United Nations*, vol. 557 (1966), no. 8132, 143; "Amendments to Article 109," 12 June 1969, TIAS 6529, UST, vol. 19, pt. 5, 5450; "Amendments to Article 61," 24 September 1973, TIAS 7739, UST, vol. 24, pt. 2, 2225.

ARTICLE 2(3). All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

ARTICLE 2(4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.

ARTICLE 2(7). Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

ARTICLE 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggres-

sion and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

CHAPTER VII, ARTICLE 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

CHAPTER VIII, ARTICLE 52(1). Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

CHAPTER VIII, ARTICLE 53(1). The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.

CHAPTER VIII, ARTICLE 54. The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security.

APPENDIX C

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE (SELECTED ARTICLE)

SOURCE: "Statute of the International Court of Justice," 26 June 1945, *Statutes at Large*, vol. 59:1031; TS 993; Bevans, vol. 3:1179.

ARTICLE 38(1). The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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